Supreme Court, U.S.
FILED
APR 4 2005
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No. _____

In The Supreme Court of the United States

LEONARDO'S PIZZA BY THE SLICE, INC. and 710 CORP.,

Petitioners,

v.

WAL-MART STORES, INC., VISA U.S.A. INC. and MASTERCARD INTERNATIONAL, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this antitrust class action, the Second Circuit Court of Appeals incorrectly held Appellants 710 Corporation and Leonardo's Pizza By the Slice, Inc., unnamed class members and objectors to terms of the proposed settlement, did not preserve for purposes of appeal, their objections to Appellee Class Counsel's fee request and thereby avoided ruling on whether risk enhancement fee-multipliers are appropriate in cases brought under federal fee-shifting statutes, specifically antitrust cases. The questions presented are:

1. Whether risk enhancement fee-multipliers are appropriate in cases brought under federal fee-shifting statutes, specifically antitrust cases.

2. Whether the Second Circuit correctly held Appellant Objectors did not preserve their objections to Class Counsel's fee request.

LIST OF PARTIES

Petitioners are:

Leonardo's Pizza By The Slice, Inc. and 710 Corp.

Respondents are:

Wal-Mart Stores, Inc., The Limited, Inc., Sears Roebuck and Co., Safeway Inc., Auto-Lab of Farmington Hills, Bernie's Army-Navy Store, Burlington Coat Factory Warehouse Corporation, Circuit City Stores, Inc., The Coffee Stop, Inc. d/b/a/ Torreo Coffee & Tea Company, Computer Supplies Unlimited, Denture Specialists, Inc., Payless Shoesource, Inc., Shoes Etc., Inc. d/b/a/ Arnold's Shoes, Scrub Shop, Inc., Sportstop, Inc., Geneva White, D.M.D., UCC Kwik Doc., Inc., f/k/a UCC Express, Inc., International Mass Retail Association, National Retail Federation, and Food Marketing Institute, Constantine & Partners PC, and Dow Jones and Company, Inc.

Visa U.S.A. Inc. and Mastercard International, Inc.

Citigroup, Inc., Pulse EFT Association, and Edgar, Dunn and Company.

Reyn's Pasta Bella LLC, Jeffrey Ledon DeWeese, M.D., Barry Leonard d/b/a Critter Fritters, Hat-In-The-Ring, Inc. d/b/a Eddie Rickenbacker's, NuCity Publications, Inc,. Lupita Llamas Martinez d/b/a Del Yaqui Restaurant, Armenta's Mexican Food, Inc., Roman Buholzer d/b/a The Continental Garden Restaurant, Preston Center Personal Training, Inc., UCC Kwik Doc., Inc., f/k/a UCC Express, Inc., Duke Products, Inc.,

LIST OF PARTIES – Continued

Southern Network Services, Inc., Sound Deals, Inc., Digital Solutions, Inc., Village Fabrics and Furnishings, Inc., Rental Solutions, Inc., Rent Tech, Inc., G & G Enterprises, NSG Enterprises, Inc., S & GJ Enterprises, Inc., Jac Vaca, Inc., John Wenturine, Y.P.I., Inc., Mobil Town USA, Inc., Young Pioneers, Inc., Digital Playroom, Inc., Wagner's Bakery, Inc., Beaches N Cream, Kickers' Corner of the Americas, Inc., MSV Records & Production, Inc., Southern Lady Flowers, Round House, Inc., Ron Jen, Inc., d/b/a The Boathouse, and Ron Fred Inc.

RULE 29.6 STATEMENT

Petitioners 710 Corporation and Leonardo's Pizza By the Slice, Inc. are privately held Florida corporations. There are no corporate parents, affiliates or publicly held companies that own 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 STATEMENT	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
This Court Is the Only Source of Guidance to the Circuits on Whether Risk Enhancement Fee Multipliers are Appropriate in Cases Brought Under Federal Fee-Shifting Statutes, Specifically Antitrust Cases	4
The Second Circuit's Ruling on Preservation of Issues for Appeal Is Clearly Erroneous and an Error of Law	8
CONCLUSION	14
APPENDICES	App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Brytus v. Spang, 203 F.3d 238 (3rd Cir. 2000) 5, 6

City of Burlington v. Dague, 505 U.S. 557 (1992) 4, 5, 6, 7

City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2nd Cir. 1977) 7

In re Prudential Fee Opinion, 962 F.Supp. 572 (D.N.J. 1997) 6

In re Prudential Ins. Co. of America Sales Practices Litigation, 148 F.2d 283 (3rd Cir. 1998) 6

In re Visa Check/Mastermoney Antitrust Litig., 2003 WL 1712568 at *2-*5 (E.D.N.Y. 2003) 3

In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2nd Cir. 2001) 2

In re Visa Check/Mastermoney Antitrust Litig., 297 F.Supp.2d 503 (E.D.N.Y. 2003) 2, 3, 12

In re Vitamins Antitrust Litig., 305 F.Supp.2d 100 (D.D.C. 2004) 5

In re Washington Public Power Supply System Securities Litig., 779 F.Supp. 1063 (D.Ariz. 1990) 8

Staton v. Boeing, 327 F.3d 938 (9th Cir. 2003) 6

United States v. Braunig, 553 F.2d 777 (2nd Cir. 1977) 13

United States v. Harrell, 268 F.2d 141 (2nd Cir. 2001) 11

United States v. Knuckles, 581 F.2d 305 (2nd Cir. 1978). 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Rollins, 522 F.2d 160 (2nd Cir. 1975) 13

United States v. Schwartz, 535 F.2d 160 (2nd Cir. 1976) 13

United States v. Singh, 628 F.2d 758 (2nd Cir. 1980) 13

United States v. Williams, 504 U.S. 36 (1992) 11

Wal-Mart v. Visa/Mastercard v. Leonardo's Pizza by the Slice, 2005 WL 15056 (2nd Cir. 2005) 9, 10, 11, 12

UNITED STATES CONSTITUTION

15 U.S.C. §1 1

15 U.S.C. §2 1

15 U.S.C. §4 1

15 U.S.C. §15 1

15 U.S.C. §15(a) 4

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 1

28 U.S.C. §1337 1

FEDERAL RULES OF CRIMINAL PROCEDURES

FED.R.CRIM.P. 12 12

FED.R.CRIM.P. 12(b)(3) 12

FED.R.CRIM.P. 12(f) 12, 13

FED.R.CRIM.P. 29 12

FED.R.CRIM.P. 30 12

TABLE OF AUTHORITIES – Continued

Page

FED.R.CRIM.P. 41(e) 13

FED.R.CRIM.P. 41(f) 13

FED.R.CRIM.P. 41(h) 12

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, 710 Corporation and Leonardo's Pizza By the Slice, Inc. (hereinafter referred to as "Leonardo's" collectively), respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-titled case on January 4, 2005.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 396 F.3d 96. The opinion of the district court is reported at 297 F.Supp.2d 503.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 2005. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This class action case arises under Sections 1, 2, 4 and 15 of the Sherman Antitrust Act, 15 U.S.C. §§1, 2, 4 and 15. Exclusive jurisdiction within the United States courts is granted by 28 U.S.C. §1331 and §1337.

STATEMENT OF THE CASE

This Petition seeks a review of the Opinion issued January 4, 2005, by the U.S. Court of Appeals for the Second Circuit, affirming the district court's Memorandum and Order entered December 19, 2003, approving the proposed class action settlement and the plan of allocation, and specifically awarding certain attorneys' fees to lead counsel and twenty-nine other law firms. *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 507 (E.D.N.Y. 2003).

Named Plaintiffs, representing a class of approximately five million merchants, filed this antitrust action on October 25, 1996, against defendants Visa and Mastercard alleging the existence of a tying arrangement in violation of Section 1 of the Sherman Act, based upon defendants' requirements that any merchant honoring their credit cards must honor their debit cards as well. *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 507 (E.D.N.Y. 2003); and *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 129-30 (2nd Cir. 2001). Named Plaintiffs also alleged that the defendants conspired and attempted to monopolize the debit card industry, in violation of Section 2 of the Sherman Act. *Id.* A class was certified on February 22, 2000, and the Court of Appeals for the Second Circuit affirmed the certification order on October 17, 2001. *In re Visa Check/Mastermoney*, 280 F.3d 124 (2nd Cir. 2001). Parties on both sides filed summary judgment motions which were heard on January 10, 2003. *In re Visa Check/ Mastermoney*, 297 F.Supp.2d at 507-508. Defendants' motions were denied in full; the class' motions were granted in part.

In its summary judgment opinion, the district court found that there were no issues of material fact as to four of the elements of the *per se* antitrust analysis with respect to Defendant Visa, and no issues of material fact as to all but the fourth element with respect to Defendant Mastercard; the four elements being: "(1) that the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable market power in the tying market." *In re Visa Check/Mastermoney Antitrust Litig.*, 2003 WL 1712568 at *2-*5 (E.D.N.Y. 2003). The court also determined there was no issue of material fact regarding the relevant product market. *Id.* at *7.

Trial of this case began April 28, 2003, but was suspended when Defendant Mastercard agreed to settle. *Id.* All parties entered into a proposed settlement on April 30, 2003. *Id.* Unnamed Class Members and Objectors, 710 Corporation and Leonardo's, filed their Preliminary Objections to Proposed Settlement on September 5, 2003, and appeared at the fairness hearing conducted on September 25, 2003. The district court issued its Memorandum and Order on December 19, 2003, approving the proposed settlement and plan of allocation, and awarding attorneys' fees to lead counsel and 29 other law firms representing class members. *In re Visa Check*, *supra*, 297 F.Supp.2d at 507.

REASONS FOR GRANTING THE PETITION

This Court is the Only Source of Guidance to the Circuits on Whether Risk Enhancement Fee Multipliers are Appropriate in Cases Brought Under Federal Fee-Shifting Statutes, Specifically Antitrust Cases.

The first question presented is whether risk enhancement fee-multipliers are appropriate in cases brought under federal fee-shifting statutes, specifically antitrust cases. This Court indicated in *City of Burlington v. Dague*, 505 U.S. 557 (1992) that contingency risk fee enhancements for any and all cases brought under federal fee-shifting statutes are impermissible. In *Dague*, this Court determined "that enhancement for contingency is not permitted under the [federal] fee-shifting statutes at issue." *Dague*, *supra*, at 567. This ruling is applicable to all federal fee-shifting statutes regardless of their subject matter because this Court explicitly stated that "our case law construing what is a 'reasonable' fee applies uniformly to all [federal fee-shifting statutes]." *Dague*, *supra*, at 562. Consequently, a reasonable fee is to be determined without regard for contingent risks. *Id.* at 566.

The instant case is by its nature (as are all private antitrust actions) a statutory fee-shifting case. Section 15 of Title 15, United States Code, states: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [. . .] and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a). If this case had not settled but instead proceeded to trial, and concluded by judgment in favor of plaintiffs, the recovery for the class would have been trebled, but the attorneys' fees would

have been limited to the unenhanced lodestar under the holding of *Dague*, *supra*. The fee issue is one reason why it is important that antitrust class action "[s]ettlements do not come too early to be suspicious nor too late to be a waste of resources." *In re Vitamins Antitrust Litig.*, 305 F.Supp.2d 100, 105 (D.D.C. 2004).

Without question, if this case had concluded with a fully favorable summary judgment or fully favorable post trial judgment, the attorneys for the class would have been limited to their lodestar, even if the final judgment's value had exceeded the value of the settlement in this matter. The Third Circuit, though not faced with this precise issue, recently took note of this very issue in *Brytus v. Spang*, 203 F.3d 238 (3rd Cir. 2000), stating, "there remains the possibility that in some cases counsel for a class of plaintiffs may receive a higher fee award upon settlement than they would have received had the case proceeded to judgment." *Id* at 247. However, in *Brytus*, the court declined to rule on what it said was "some hypothetical situation that might be presented in the future." Now, this formerly "hypothetical" situation presents itself to this Court. Class Counsel here received far greater fees after settlement than they would have been awarded had this case been concluded by judgment favorable to the affected class. In antitrust cases, to allow enhanced attorney fees if the matter is settled, but not to allow enhancement if the matter is pursued to a judgment by the trial court, clearly places the interests of class counsel and the members of the class fundamentally, and irremediably at odds.

This is an issue of critical importance in the law of attorney fee awards. "Although the Supreme Court has not

addressed whether this prohibition [against risk enhancements] also applies in common fund cases, [. . .] 'the Court's reasoning for excluding risk enhancements in fee-shifting cases applies equally to common fund cases.' [. . .] [J]urisdictions are split as to the application of risk enhancements in the common fund context." *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.2d 283, 341 n.121 (3rd Cir. 1998) (quoting *In re Prudential Fee Opinion*, 962 F.Supp. 572, 581 n.24 (D.N.J. 1997)).

Recently, in *Staton v. Boeing*, 327 F.3d 938, 966 (9th Cir. 2003), the court stated if the "amount of fees Boeing agreed to pay in the settlement agreement [was] distinctly higher than the fees class counsel could have been awarded by the district court using the lodestar method, the court would almost surely have had to find the fees unreasonable." Although that particular situation was not before the Ninth Circuit in *Brytus*, the court nonetheless warned, "courts have to be alert to the possibility that the parties have adopted [their particular settlement agreement] precisely because the fee award is in fact higher than could be supported on a statutory fee-shifting basis [. . .]." *Id.* at 970.

This Court has "established a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). In *Dague*, this Court determined "that enhancement for contingency is not permitted under the [federal] fee-shifting statutes at issue." *Dague*, *supra*, at 567. This ruling is applicable to all federal fee-shifting statutes regardless of their subject matter. This Court explicitly stated that "our case law construing what is a 'reasonable' fee applies uniformly to all of them [federal fee-shifting statutes]." *Dague*, *supra*,

at 562. Consequently, a reasonable fee is to be determined without regard for contingent risks. *Id.* at 566.

Further, this Court has stated that if contingency enhancement were to be used in any contingent fee cases (brought under fee-shifting statutes), it would have to be applied to all such cases. *Dague, supra*, at 565. This result would, this Court reasoned, encourage non-meritorious claims to be brought, which is against public policy and Congressional intent. *Dague, supra*, at 563. This Court therefore concluded that "just as the statutory language limiting fees bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss." *Dague, supra*, at 565.

This Court was especially concerned with the fact that "[t]o award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail." *Dague, supra*, at 565. Thus, this Court concluded, "[i]t is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intricacies of the fee-paying market in every respect." *Dague, supra*, at 566-67.

The present case is definitely unique, since it is, in all likelihood, the largest settlement in class action history, with the value of the compensatory relief to the class approximated at $3.383 billion. However, this is due entirely to the size of the affected class, which is approximated at five million members. *Id.* at 506. The set of circumstances presented here has resulted in a "distortion of the equitable fund theory," warned against in *City of*

Detroit v. Grinnell Corp., 560 F.2d 1093, 1098 (2nd Cir. 1977) (*"Grinnell II"*).

Extremely large "megafund" cases involve fee-calculation hazards not present in smaller cases. For example, in a securities class action case involving a settlement of approximately $687 million, the court observed, "the immense size of the settlement fund in this action far exceeds the amount of settlement funds in virtually all similar cases that counsel have cited and/or that the Court has reviewed. Just one percent of the settlement in this action is the equivalent of nearly seven million dollars. Every adjustment of .1% (1/10th of one per cent) in an applied percentage would result in a fee variance amounting to approximately $700,000." *In re Washington Public Power Supply System Securities Litig.*, 779 F.Supp. 1063, 1085 (D.Ariz. 1990); *vacated in part*, 19 F.3d 1291 (9th Cir. 1994). An even greater potential for fee-calculation excess exists in this case. One-tenth of one per cent (0.1%) here is approximately $3,383,400.

The Second Circuit's Ruling on Preservation of Issues for Appeal Is Clearly Erroneous and an Error of Law

The second question presented is whether at the trial level Leonardo's preserved for appeal their objections, to Appellee Class Counsel's fee request. In its opinion issued January 5, 2005, the Court of Appeals for the Second Circuit held Leonardo's "did not preserve" their objections to class counsel's fee request at the district court level, stating in its opinion at footnote 29, "[a]t the district court, Leonardo's failed to contest class counsel's fee petition. [. . .] The record is clear: Leonardo's did not preserve for appeal its challenge to the fee award." *Wal-Mart v. Visa/*

Mastercard v. Leonardo's Pizza by the Slice, 396 F.3d 96, 124 n.29 (2nd Cir. 2005). App. 54. This assertion is factually and legally contradicted by the record as well as the district court's prior rulings. Class Counsel's own Brief in Opposition admits that Leonardo's both objected to the Fee Petition, and incorporated all other unnamed class members' fee objections, including those objections based on fee-shifting arguments. *Appellee/Cross-Appellant Class Counsel's Brief (i) in Opposition to the Appeal of Objectors 710 Corp. and Leonardo's Pizza By the Slice, Inc. and (ii) in Support of Class Counsel's Cross-Appeal from the District Court's Award of Attorneys' Fees,* at pp. 52-53.

In addition, the district court specifically instructed all objectors at the fairness hearing, "[l]et me emphasize at the outset that I have read these objections. It is not useful simply to repeat them. I am going to give you an opportunity to be heard, but don't feel constrained to get up and repeat what is in your papers as though nobody has read them. I have. So you don't need to speak if you don't want to." *Transcript of Proceedings, Settlement Fairness Hearing, September 25, 2003*, p. 8, App. 125. Counsel for Leonardo's, Edward W. Cochran, Esq., was permitted "up to five minutes" to present argument. *Id.* at 12, App. 128. On the subject of class counsel's fee award, Mr. Cochran complied with the court's instructions for brevity, stating clearly, "our objections contain matters as to the fee. I will not speak on that at all fully. I will incorporate the comments of other objectors so that they are not repeated." *Id.* at 58, App. 133.

On appeal the Second Circuit ruled that the issue regarding fees had not been properly preserved by Leonardo's at the fairness hearing. The Court of Appeals

found that there was only "one sentence addressing the fee petition in Leonardo's ten-page brief objecting to the Settlement." *Wal-Mart*, *supra*, at 124 n.29. In fact, at least seven of the thirteen separate paragraphs contained in Leonardo's pleadings objecting to the Settlement, refer to the issue of Class Counsel's fee request. They are as follows:

> 7. The June 13, 2003 Notice specifically fails to inform class members what the amount of the *attorney's fees* in this matter are, or will be, or will be requested and the relationship, in terms of a percentage, of the amount of the *attorney fees* to the rest of the settlement.
>
> 8. The June 13, 2003 Notice specifically fails to inform class members as to whether the *attorney's fees* are based on the present value of the settlement or the potential payout over time, and whether the *attorney fees* are to be paid up front or over time in synchronization with the payout to class members.
>
> 9. The June 13, 2003 Notice deprives unnamed class members of Due Process of law by allowing the Class Counsel to file for a specific amount of *attorney's fees* over a month later on August 18, 2003, without re-notice to, or publication to, the class of the specific amount requested.
>
> 10. The June 13, 2003 Notice deprives unnamed class members of Due Process of law by requiring unnamed class members to calendar the August 18, 2003 date and then search on-line to find Class Counsel's *fee request*.
>
> 11. The June 13, 2003 Notice deprives unnamed class members of Due Process of law by allowing class counsel to effectively shorten the time period

> for objecting to their *requested fees* to 18 days, i.e. from August 18, 2003 until September 5, 2003.
>
> 12. Objectors respectfully request to reserve the right to adopt and incorporate in their Preliminary Objections to the Proposed Settlement *all other timely filed objections* that are not inconsistent with these Objections.
>
> 13. Objectors request the Court carefully consider the amount of *attorneys' fees and expenses* requested by class counsel, an issue which Objectors expressly reserve for further argument when the matter of fees is considered.

Appellants 710 Corp. and Leonardo's Pizza By the Slice, Inc. Preliminary Objections to Proposed Settlement, pp. 8-9 (emphasis added). This utterly refutes Class Counsel's assertion, "Leonardo's barely objected to the fee petition." *Appellee's Opening Brief, supra* at 52.

The Second Circuit did not rule in accord with the record below. An issue is reviewable on appeal if it was "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal citations omitted). "A claim is 'pressed or passed upon' when it fairly appears in the record as having been raised or decided." *United States v. Harrell*, 268 F.2d 141, 146 (2nd Cir. 2001). Here, the Court of Appeals ignored both the record and the district court's specific factual finding that Leonardo's objected to the Class Counsel's Fee Petition.

The district court clearly and unmistakably found that Leonardo's preserved their objections to Class Counsel's fee request, stating, "[a]s noted earlier, *seventeen (17) merchants filed objections to the fee request*. They are: Round House, Inc. d/b/a Smuggler's Cove; Ron Fred, Inc.

d/b/a Bailey's; Ron Jen., Inc. d/b/a The Boathouse; Preston Center Personal Training, Inc.; Roman Buholzer d/b/a The Continental Garden Restaurant; Rent Tech, Inc.; Rental Solutions, Inc.; Thomas McMackin (as President of Wagner's Bakery, Inc.); Beaches N Cream; Kickers Corner of the Americas, Inc.; ***Leonardo's Pizza by the Slice***; ***710 Corp.***; Sounds Deals, Inc.; Digital Playroom, Inc.; Southern Network Services, Inc.; Duke Products, Inc.; and Village Fabrics and Furnishings, Inc." *In re Visa Check/ Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 522, n.27 (E.D. N.Y. 2003) (Emphasis added.) Thus, the record is clear that at the district court level, Leonardo's contested Class Counsel's fee petition, and in so doing, preserved their rights to appeal.

Further, the Court of Appeals found against Leonardo's based upon the rule of law that "where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal." Yet, the cases cited by the Court in support of this proposition are criminal cases which all refer specifically to either FED.R.CRIM.P. 12(b)(3) and Rule 41(h). These Rules concern motions to suppress evidence.[1] "Rule 12(f) of the FEDERAL RULES OF CRIMINAL

[1] "The reliance of the trial judge on the assistance of counsel in shaping the issues to be decided by the jury does not permit us to countenance such a flagrant shifting of position on appeal. The rules requiring timely filing of pretrial defenses and objections, timely motions for acquittal because of insufficient evidence, timely objections to the jury charge, and providing for filing by the parties of requests for jury instructions (FED.R.CRIM.P. 12, 29, 30) are grounded in the need to fix the legal outlines of the case in the trial court. Counsel may not adopt one view of the proof in the trial court, thereby limiting the legal issues, and then adopt a different view of the evidence in order to raise

(Continued on following page)

PROCEDURE clearly states that '[f]ailure by a party to raise . . . objections . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.'" *United States v. Singh*, 628 F.2d 758, 762 (2nd Cir. 1980).[2]

Leonardo's did not in any way shift their position on appeal. Class Counsel was fully informed of all legal arguments at issue in this appeal at the time of the fairness hearing. Thus, the "waiver" rationale used by the Court of Appeals is simply inapplicable.

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other issues on appeal." *United States v. Knuckles*, 581 F.2d 305, 310 (2nd Cir. 1978).

[2] *See United States v. Braunig*, 553 F.2d 777, 780 (2nd Cir. 1977) ("Rule 12(f) FED.R.CRIM.P. makes clear that '(f)ailure by a party to raise defenses or objections or to make requests which must be made prior to trial, . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.' The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal" (internal citations omitted)); *United States v. Rollins*, 522 F.2d 160, 165 (2nd Cir. 1975) ("[a] motion to suppress evidence pursuant to Rule 41(f) or its predecessor Rule 41(e), of the Federal Rules of Criminal Procedure must be made before trial unless its delay is justified. Similarly, the failure to assert before trial a particular ground for a motion to suppress certain evidence operates as a waiver of the right to challenge the admissibility of the evidence on that ground") (internal citations omitted); *United States v. Schwartz*, 535 F.2d 160, 163 (2nd Cir. 1976) ("the failure to assert a particular ground in a pre-trial suppression motion operates as a waiver of the right to challenge the subsequent admission of evidence on that ground").

CONCLUSION

This case is of extreme importance in finally resolving both the issues set out herein. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: August 25, 2004 Decided: January 4, 2005)

Docket Nos. 04-0344-cv, 04-1052-cv,
04-0514-cv, 04-1055-cv, 04-2105-cv

WAL-MART STORES, INC., THE LIMITED, INC., SEARS ROEBUCK AND CO., SAFEWAY INC., AUTO-LAB OF FARMINGTON HILLS, BERNIE'S ARMY-NAVY STORE, BURLINGTON COAT FACTORY WAREHOUSE CORPORATION, CIRCUIT CITY STORES, INC., THE COFFEE STOP, INC. d/b/a TORREO COFFEE & TEA COMPANY, COMPUTER SUPPLIES UNLIMITED, DENTURE SPECIALISTS, INC., PAYLESS SHOESOURCE, INC., SHOES ETC., INC. d/b/a ARNOLD'S SHOES, SCRUB SHOP, INC., SPORTSTOP, INC., GENEVA WHITE, D.M.D., UCC KWIK DOC., INC., f/k/a UCC EXPRESS, INC., INTERNATIONAL MASS RETAIL ASSOCIATION, NATIONAL RETAIL FEDERATION, and FOOD MARKETING INSTITUTE,

Plaintiffs-Appellees,

CONSTANTINE & PARTNERS PC, et al.,

Class Counsel-Appellees-Cross-Appellants,

DOW JONES AND COMPANY, INC.,

Intervenor-Plaintiff-Appellee,

- v. -

VISA U.S.A. INC. and MASTERCARD INTERNATIONAL, INC.,

Defendants-Appellees,

CITIGROUP, INC., PULSE EFT ASSOCIATION,
and EDGAR, DUNN AND COMPANY,

Interested Parties,

- v. -

REYN'S PASTA BELLA LLC, JEFFREY LEDON DEWEESE, M.D.,
BARRY LEONARD d/b/a CRITTER FRITTERS,
HAT-IN-THE-RING, INC. d/b/a EDDIE RICKENBACKER'S,

Objectors-Appellants,

NUCITY PUBLICATIONS, INC.,

Objector-Appellant,

LUPITA LLAMAS MARTINEZ d/b/a DEL YAQUI RESTAURANT,
ARMENTA'S MEXICAN FOOD, INC.,

Objectors-Appellants,

LEONARDO'S PIZZA BY THE SLICE, INC., 710 CORP.,

Objectors-Appellants-Cross-Appellees,

ROMAN BUHOLZER d/b/a
THE CONTINENTAL GARDEN RESTAURANT,

Objector-Cross-Appellee,

PRESTON CENTER PERSONAL TRAINING, INC.,
UCC KWIK DOC., INC., f/k/a UCC EXPRESS, INC.,
DUKE PRODUCTS, INC., SOUTHERN NETWORK SERVICES, INC.,
SOUND DEALS, INC., DIGITAL SOLUTIONS, INC.,
VILLAGE FABRICS AND FURNISHINGS, INC.,
RENTAL SOLUTIONS, INC., RENT TECH, INC.,
G & G ENTERPRISES, NSG ENTERPRISES, INC.,
S & GJ ENTERPRISES, INC., JAC VACA, INC.,
JOHN WENTURINE, Y.P.I., INC., MOBIL TOWN USA, INC.,
YOUNG PIONEERS, INC., DIGITAL PLAYROOM, INC.,
WAGNER'S BAKERY, INC., BEACHES N CREAM,
KICKERS' CORNER OF THE AMERICAS, INC.,

MSV RECORDS & PRODUCTION, INC., SOUTHERN LADY FLOWERS, ROUND HOUSE, INC., RON JEN, INC., d/b/a THE BOATHOUSE, and RON FRED, INC.,

Objectors.

Before:

CABRANES AND WESLEY, *Circuit Judges.**

Appeal from an order of the United States District Court for the Eastern District of New York (Gleeson, J.), dated December 19, 2003, approving class settlement and awarding attorneys' fees.

AFFIRMED.

Richard J. Archer, Archer & Hanson, Occidental, CA (James A. Kopcke, Golden Kopcke, LLP, San Francisco, CA, *on the brief*) *for Objectors-Appellants Reyn's Pasta Bella, LLC, Jeffrey LedonDeWeese, MD., Barry Leonard d/b/a Critter Fritters, and Hat-In-The-Ring, Inc. d/b/a Eddie Rickenbacker's.*

Stanley M. Grossman (H. Adam Prussin, John Balestriere, Murielle J. Steven Walsh, *on the brief*), Pomerantz Haudek Block Grossman & Gross, LLP, New York, NY (Howard Langer, John Grogan, Langer and Grogan,

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* Because the Honorable Chester J. Straub recused himself prior to oral argument, this case was decided by a two-judge panel. *See Murray v. NBC*, 35 F.3d 45 (2d Cir. 1994).

P.C., Philadelphia, PA, *on the brief*; Joseph Goldberg, Sara Berger, Alexandra Freedman Smith, Zachary Ives, Freedman Boyd Daniels Hollander Goldberg & Cline, P.A., Albuquerque, NM, *on the brief*) *for Objector-Appellant Nu-City Publications, Inc.*

John Rasmussen (Dale W. Robinson, *on the brief*), Johnson, Rasmussen, Robinson & Allen, P.L.C., Mesa, AZ *for Objectors Appellants Armenta's Mexican Food, Inc. and Lupita Llamas Martinez d/b/a Del Yaqui Restaurant.*

N. Albert Bacharach, Jr., Gainesville, FL *for Objectors-Appellants-Cross-Appellees Leonardo's Pizza By the Slice, Inc. and 710 Corp. Inc.*

M. Laurence Popofsky (Stephen V. Bomse, Marie L. Fiala, Peggy J. Williams, Russell P. Cohen, *on the brief*), Heller Ehrman White & McAuliffe LLP, San Francisco, CA (Philip H. Curtis, Robert C. Mason, Arnold & Porter LLP, New York, NY, *on the brief*; Kevin J. Arquit, Joseph F. Tringali, Mariya S. Treisman, Simpson Thacher & Bartlett LLP, New York, NY, *on the brief*; Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, *on the brief*; Keila D. Ravelo, Clifford Chance US LLP, New York, NY *on the brief*) *for Defendants-Appellees.*

Lloyd Constantine (Robert L. Begleiter, Matthew L. Cantor, Stacey Anne Mahoney, Michelle A. Peters, Amy N. Roth, Gordon Schnell, Jonathan Shaman, Jeffrey I. Shinder, on the brief), Constantine & Partners, New York, NY *for Class Counsel-Appellees-Cross-Appellants.*

Lawrence W. Schonbrun, Law Offices of Lawrence W. Schonbrun, Berkeley, CA *on submission for Objector-Cross-Appellee Roman Buholzer d/b/a The Continental Garden Restaurant.*

WESLEY, *Circuit Judge*:

Appellants challenge the district court's approval of a class action settlement, including the award of attorneys' fees. The class action involved approximately five million merchants and alleged, *inter alia*, that defendants Visa U.S.A. Inc. and MasterCard International Inc. tied merchant use of defendants' debit products to use of defendants' credit cards, in violation of the Sherman Act. Plaintiffs contended that Visa and MasterCard used their power in the credit card market to force merchants to accept an artificially-inflated transaction fee when accepting payment from consumers using debit cards operated by Visa or MasterCard. Plaintiffs further alleged that defendants employed a scheme of anti-competitive conduct to bar competition in the debit card market. In this bitterly contested lawsuit fought by expert counsel on all sides, the parties agreed to settle just before trial commenced. The resulting settlement was the largest in the history of antitrust law. As part of the settlement, defendants agreed not to tie their debit and credit products together and to pay more than $3 billion to plaintiffs in exchange for the release of any and all claims that were or could have been filed against defendants or their member banks (non-parties in this action) based on the conduct alleged.

On appeal, appellants contest the validity of the settlement's release of non-parties, the adequacy of class representation, the adequacy of notice, the fairness of settlement, and the reasonableness of attorneys' fees. We **AFFIRM** the district court's order in all respects.

BACKGROUND

This case involves a clash of commercial titans. Plaintiffs, a class of merchants approximately five million strong led by Wal-Mart, the world's largest retailer, and several other large and sophisticated merchants, including The Limited, Sears, and Safeway, filed suit on October 25, 1996 against Visa U.S.A. Inc. and MasterCard International, Inc. ("Visa" and "MasterCard," respectively),[1] seeking damages amounting to tens of billions of dollars for alleged violations of Sections One and Two of the Sherman Act, 15 U.S.C. §§ 1, 2.[2] First, plaintiffs claimed that the defendants' "Honor All Cards" policy, which forced merchants who accepted Visa and MasterCard credit cards to accept Visa and MasterCard debit cards, was an illegal "tying arrangement" that violated Section One of the

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[1] Visa and MasterCard are national bank card associations. Their members include more than 6,000 banks. *See* 2d Am. Compl. ¶¶ 30-31, 43.

[2] The district court described plaintiffs' claims, and the factual basis for those claims, in its resolution of the parties' motions for summary judgment, *In re Visa Check/Mastermoney Antitrust Litig.*, No 96-CV-5238, 2003 WL 1712568 (E.D.N.Y. Apr. 1, 2003) (*"Visa Check I"*), and its decision to certify the instant class, *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000) (*"Visa Check II"*), *aff'd*, 280 F.3d 124 (2d Cir. 2001). We assume familiarity with those decisions and with the decision by the district court giving rise to this appeal, *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (*"Visa Check III"*).

Sherman Act.[3] Second, plaintiffs alleged that defendants used their Honor All Cards policy in conjunction with other anti-competitive conduct to monopolize the debit market, in violation of Section Two of the Sherman Act. As a consequence, plaintiffs claimed that they incurred supra-competitive "interchange fees" (described in the next subheading) during every debit and credit transaction made between October 1992 and June 2003.

A. Visa and MasterCard Transactions

Essentially, every debit or credit card transaction using a Visa or MasterCard product involves five entities: (1) Visa or MasterCard, (2) a "card-issuing" bank, (3) an "acquiring" bank, (4) a consumer, and (5) a merchant. At the outset, either Visa or MasterCard, each an association, grants a license to a member bank to issue credit and debit cards with its brand name. A "card-issuing" member bank then issues a credit or debit card to a cardholder with either the Visa or MasterCard brand name. An "acquiring" bank, a member of Visa and MasterCard, contracts with a merchant to accept payment through Visa and MasterCard. When a cardholder makes a purchase with either a Visa or MasterCard product, the acquiring institution reimburses the merchant for the cardholder's purchase, less a "discount fee." The discount fee is determined by the acquiring institution. The card-issuing bank charges an "interchange fee" each time it provides funds to

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[3] A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.'" *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir. 1980) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

the acquiring bank as payment to a merchant for the cardholder's purchase. Visa and MasterCard set the interchange fee that all card-issuing banks charge. Economics demands that the discount fee be greater than the interchange fee the acquiring institution must pay to the card-issuing institution. *See Visa Check II*, 192 F.R.D. at 72. The following illustrates this network of transactions:

> Bank A issues a Visa credit card to Consumer X, who purchases a garment for $100 at Store Y, which was "acquired" for Visa by Bank B. Visa rules mandate that Bank B must pay Bank A an interchange fee of 1.25% of the amount of the transaction, *i.e.*, $1.25. Bank B will charge Store Y a "discount fee" higher than $1.25 in order to recover the mandated interchange fee and other fees that Visa rules mandate Bank B to pay Visa on each and every Visa credit card (and debit card) transaction and to earn a profit for itself. Thus, Bank B may charge a discount fee of 1.60% of the transaction amount (or $1.60) to Store Y. When Store Y presents Consumer X's $100 Visa transaction to Bank B, the bank will credit Store Y's account for $98.40, send the Visa mandated $1.25 interchange fee to Bank A and retain the $.35 balance of the "discount fee."

2d Am. Compl. ¶ 8(o).

B. Procedural History

Plaintiffs originally filed their complaint on October 26, 1996. The district court certified plaintiffs as a class in February 2000. *See Visa Check II*, 192 F.R.D. at 71. The class includes "all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept Visa[]Check and/or

MasterMoney debit cards under the challenged tying arrangements during the fullest period permitted by the applicable statute of limitations," *id.* at 90, which is the period from October 25, 1992 through June 21, 2003, *Visa Check III*, 297 F. Supp. 2d at 514 n.12, 519. Plaintiffs' discovery included "a review of approximately five million pages of documents, almost 400 depositions, discovery from roughly 200 non parties, 54 expert reports, and 21 expert depositions." *Id.* at 511 n.8. In June 2002, plaintiffs sent a notice of pendency to all class members. On April 30, 2003, "after complete and exhaustive discovery, summary judgment proceedings, and substantial mediation," *id.* at 511, Visa and MasterCard each signed a memorandum of understanding setting forth a preliminary settlement agreement with plaintiffs, *id.* at 508. The final settlement agreements were signed on June 4, 2003 (collectively, the "Settlement").[4] Later that month, the district court approved the notice of settlement, which described the terms of settlement and quoted the Settlement's release verbatim. *Visa Check III*, 297 F. Supp. 2d at 509 n.5, 516; Notice of Settlement ¶¶ 14, 18-19.[5] Eighteen

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[4] Although the first page of each settlement agreement states that the agreement was made "as of the 4th day of June 2003," the district court found that the agreements were dated June 5, 2003. We do not know the basis on which the court concluded that the settlement agreements were dated June 5th, but this discrepancy is inconsequential to the issues before us.

[5] In pertinent part, the release states:

> [T]he Released Parties shall be released and forever discharged from all manner of claims . . . against the Released Parties . . . that any Releasing Party ever had, now has or hereafter can, shall or may have, relating in any way to any conduct prior to January 1, 2004 concerning any claims alleged in the Complaint or any of the complaints consolidated therein, including, without limitation, claims which

(Continued on following page)

merchants, in this class of approximately five million, filed objections to the Settlement and the allocation plan. *Id.* at 509. In September 2003, the district court held a fairness hearing during which it offered each objector the opportunity to be heard. *Id.* On December 19, 2003, after considering these objections, the district court issued a Memorandum and Order (a) approving the proposed settlement agreements between plaintiffs and Visa and MasterCard and the plan of allocation to distribute funds to class members, and (b) awarding attorneys' fees. *Id.* at 507, 526. The court entered final judgments on January 30, 2004. Each appellant filed a timely appeal.

C. The Settlement

The Settlement is the culmination of approximately seven years of hard-fought litigation and represents "the largest antitrust settlement in history." *Id.* at 508. The district court described the Settlement as providing for, among other things:

> (1) the cessation, as of January 1, 2004, of defendants' "Honor All Cards" rules, by which

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> have been asserted or could have been asserted in this litigation which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, or other law or regulation, or common law, including, without limitation, the Sherman Act, 15 U.S.C. § 1 et seq.

Visa Check III, 297 F. Supp. 2d at 512 (citing settlement agreements) (emphasis added in cited case and removed here). The "Released Parties" include Visa, Visa International Service Association, MasterCard, and the member financial institutions of Visa and MasterCard. *Id.* (citing settlement agreements).

the defendants' debit card services to merchants were tied to their credit card services;

(2) the creation of a $3.05 billion settlement fund;

(3) the creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards by January 1, 2007 (80% by July 1, 2005), so merchants and consumers can distinguish these products from credit cards;

(4) the lowering, by roughly one third, of the interchange rates on debit products for the period from August 1, 2003, through December 31, 2003;[6]

(5) other injunctive relief, such as the provision of signage from defendants to merchants communicating the merchants' acceptance of defendants' untied debit products; and a prohibition on defendants enacting any rules = that prohibit merchants from encouraging or steering customers to use forms of payment other than defendants' debit cards, including by discounting other forms of payment;

(6) the Court's continuing jurisdiction to ensure compliance with the Settlement; and

(7) the release of Visa and MasterCard from claims arising out of the conduct at issue in the action prior to January 1, 2004.

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[6] This reduction caused a savings to the class of approximately $846 million. *Id.* at 509.

Id. (internal citations and footnote omitted). Visa and MasterCard will make cash payments totaling $2,025,000,000 and $1,025,000,000, respectively, in annual installments during the next ten years. *Id.* The district court concluded that "[t]he discounted present value of the total compensatory relief . . . amounts to $3,383,400,000." *Id.* at 509.

D. Issues on Appeal

1. Scope of the Release and Adequacy of Representation

At the district court, five of the eighteen objecting merchants challenged the scope of the release provided in the Settlement. All five of these merchants appealed. They are Reyn's Pasta Bella, LLC, Jeffrey Ledon DeWeese, M.D., Barry Leonard d/b/a Critter Fritters, and Hat-In-The-Ring, Inc. d/b/a Eddie Rickenbacker's (collectively, "Pasta Bella"), and NuCity Publications, Inc. The Settlement's release precludes actions for conduct occurring prior to January 1, 2004 that was or could have been alleged in the complaint. If approved by this Court, the release will bar class actions previously filed by Pasta Bella and NuCity.

Pasta Bella, purporting to represent a class, initiated an action against Visa and MasterCard and three member banks (collectively, the "*Reyn's* defendants") in the United States District Court for the Northern District of California on June 24, 2002. *Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.*, 259 F. Supp. 2d 992 (N.D. Cal. 2003)

("*Reyn's*").[7] Prior to the fairness hearing in this case, the California district court dismissed all but one of the *Reyn's* claims. *Id.* at 1004. The surviving claim alleged that the *Reyn's* defendants fixed credit card interchange fees charged by issuing banks to acquiring banks, which, in turn, set merchant discount fees charged by acquiring banks to merchants. *See id.* at 998. On March 4, 2004, the District Court for the Northern District of California dismissed *Reyn's* with prejudice, finding that the Settlement released the *Reyn's* defendants from further liability.

NuCity initiated a putative class action in the United States District Court for the Southern District of New York on November 13, 2001. *In re Visa/MasterCard Membership Rules Antitrust Litigation*, No. 01-CV-10027 ("*Membership Rules*").[8] *Membership Rules arose out of United States v. Visa USA., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *modified by* 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd* 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 45 (2004) ("*Government's Membership Rules*"). In *Government's Membership Rules*, the Government established that Visa and MasterCard's "exclusionary rules" (also known as "membership rules"), which prohibited member banks from issuing competing payment cards, such as American Express or Discover, constituted an illegal boycott and an

[7] For the purpose of discussing the effect of the Settlement on *Reyn's* claimants, this opinion assumes that the putative *Reyn's* class was certified even though *Reyn's* was dismissed before a motion for class certification had been filed.

[8] For the purpose of discussing the effect of the Settlement on *Membership Rules* claimants, this opinion assumes that the putative class in *Membership Rules* is certified even though a motion for class certification has not yet been filed.

unreasonable restraint of trade in the credit card market.[9] *Government's Membership Rules*, 344 F.3d at 229. NuCity filed *Membership Rules* on behalf of merchants injured by the boycott proven in *Government's Membership Rules*. Pursuant to an order by the district court in that case, *Membership Rules* remains in limbo pending the outcome of this appeal.

On appeal, Pasta Bella and NuCity argue that the release is overbroad. Alternatively, they argue that the release is not valid with respect to them because their interests were inadequately represented during settlement. Issues involving the release of claims are discussed in Part I of the Discussion section of this opinion.

2. Notice to the Class

The Settlement established a notice plan that required mailing the settlement notice to class members and publishing a condensed version of the settlement notice in numerous widely-distributed publications (collectively, the settlement notice and summary notice are referred to as the "Settlement Documents"). As part of the notice plan, plaintiffs' counsel provided direct notice via first class mail

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[9] The exclusionary rules are described in Visa By-law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP"). Visa By-law 2.10(e) provides in pertinent part: "the membership of any member shall automatically terminate in the event it, or its parent, subsidiary or affiliate, issues, directly or indirectly, Discover Cards or American Express Cards, or any other card deemed competitive by the Board of Directors." *Visa U S.A., Inc.*, 163 F. Supp. 2d at 379 (emphasis added in cited case and removed here). MasterCard's CPP states that "members of MasterCard may not participate either as issuers or acquirers in competitive general purpose card programs" other than with Visa. *Id.* at 381.

to 8,148,276 class members and published notices in publications with a combined circulation of more than 151 million.[10] All of this information was printed in English only.

On appeal, Pasta Bella and NuCity argue that they were denied due process because the Settlement Documents did not specifically apprise class members that approval of the Settlement would release the pending claims in *Reyn's* and *Membership Rules*.

Armenta's Mexican Food, Inc. and Lupita Llamas Martinez d/b/a Del Yaqui Restaurant (collectively, "Armenta's"), argue that the Settlement Documents and notice plan did not afford them due process or comply with Federal Rule of Civil Procedure 23. Armenta's claims that it learned of the Settlement by observing a summary notice in an English-language magazine.[11] Afterward, it retained counsel, filed its objections to the Settlement and also filed a motion to intervene. Counsel for Armenta's appeared and argued at the September 2003 fairness hearing in support of its client's objections to the Settlement. The district court's approval of the Settlement

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[10] This group of more than eight million included not only the original class members, but also "new merchants" who began accepting Visa and MasterCard after June 20, 2002 and who self-registered after the class notice was distributed. Lead Counsel Status Report, dated September 18, 2003, at 2.

[11] Armenta's claims that it never received the settlement notice in the mail. Class counsel disputes this claim, arguing that Armenta's was among the approximately 8 million class members to receive settlement notices. Regardless, whether Armenta's received personal notice is of no importance to the analysis in this opinion. At the very least, it received actual notice by publication.

implicitly denied the motion to intervene; Armenta's appealed.

These notice arguments are discussed in Part II of the Discussion section of this opinion.

3. Fairness of the Settlement

Pasta Bella, Armenta's, 710 Corp., Inc., and Leonardo's Pizza by the Slice, Inc. challenge the fairness of the Settlement. NuCity seeks limited discovery to determine whether class counsel independently valued the *Membership Rules* claims, and, if so, the amount of that valuation. Pasta Bella argues that the parties should be judicially estopped from asserting the release against the *Reyn's* claims because Visa and MasterCard failed to comply with Rule 3-13 of the Local Rules of Practice in Civil Proceedings before the United States District Court for the Northern District of California ("Northern District of California Local Rule 3-13"), which required that they file a notice of pendency in that court concerning the instant action. Part III of the Discussion section of this opinion examines all of these issues.

4. Attorneys' Fees

Class counsel submitted a fee petition to the district court seeking $609,012,000 in fees. The court found this request "excessive," "fundamentally unreasonable, and wholly out of character for a group of counsel whose commitment to the corner store merchants they represent has, until now, been admirable and unflagging." *Visa Check III*, 297 F. Supp. 2d at 522-23. Choosing between awarding fees under the "lodestar" method or

the "percentage of the fund" method, *id.* at 520-21, the court awarded plaintiffs' attorneys 6.5% of the Settlement's compensatory relief under the "percentage of the fund" method, *id.* at 524. This amounted to a fee award of $220,290,160.44. *Id.* at 507, 524-26. The court granted counsel an additional $18,716,511.44 in costs and expenses. *Id.* Objectors 710 Corp., Inc. and Leonardo's Pizza by the Slice, Inc. (collectively, "Leonardo's") appealed the fee award on the ground that it was too high. Class counsel cross-appealed on the ground that the award was too low. Roman Buholzer d/b/a The Continental Garden Restaurant responded in opposition to class counsel's cross-appeal. The district court's fee award is examined in Part IV of the Discussion section of this opinion.

DISCUSSION[12]

PART I
THE RELEASE IS VALID

Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, "[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254 (2d Cir.

[12] We review questions of law raised in this appeal *de novo*. *Abrahamson v. Bd. of Educ.*, 374 F.3d 66, 71 (2d Cir. 2004). We review the district court's approval of the instant class action settlement for abuse of discretion. *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000). The district court's fee award is also subject to review under the abuse of discretion standard. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

2001), *aff'd in part by an equally divided court and vacated in part*, 539 U.S. 111 (2003).

Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief. Plaintiffs' authority to release claims is limited by the "identical factual predicate" and "adequacy of representation" doctrines. Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement. Adequate representation of a particular claim is established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim.

A. Identical Factual Predicate Doctrine

The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the "identical factual predicate" as the settled conduct. *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982).[13]

[13] The Eighth Circuit notes, "There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact, most settling defendants insist on this." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004). The Fifth Circuit has noted, "The weight of authority establishes that . . . a court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. Apr. 1981) (quoting *Patterson v. Stovall*, 528 F.2d 108, 110 n.2 (7th Cir.

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1. Identical Factual Predicate Doctrine Permits Release of Membership Rules Claims

The Settlement precludes lawsuits relating to any conduct that was alleged in the complaint or was, or could have been, asserted in this litigation. NuCity argues that the district court strayed from the identical factual predicate rule by approving release of the *Membership Rules* claims based simply on the court's recognition of the similarities between the claims in this case and those in *Membership Rules*.[14] We disagree.

The plaintiffs in *Membership Rules* alleged that Visa and MasterCard's exclusionary rules, which prohibited member banks from issuing or providing services to other credit cards (such as Discover or American Express), inflated the cost of credit card transactions, in violation of Section One of the Sherman Act. *Id.* at 515. As part of their tying claim, plaintiffs in the case before us claimed that the exclusionary rules solidified Visa and MasterCard's power in the credit card market, enabling Visa and MasterCard to force plaintiffs to accept their debit cards. *Id.* Thus, the "exclusionary rules have been central to this

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1976)). The Third Circuit has found that refusing to grant a broad settlement release would undermine multi-district class settlements because defendants would be concerned that their exposure to liability would be too great. *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366-67 (3d Cir. 2001); *see also City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996) (discussing the identical factual predicate doctrine); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287-88 (9th Cir. 1992) (same).

[14] The district court found that "*Reyn's* is a virtual clone of the centerpiece of this case." *Visa Check III*, 297 F. Supp. 2d at 513. Pasta Bella does not challenge this conclusion or plaintiffs' right under the identical factual predicate doctrine to release the *Reyn's* claims against defendants in this action.

case from its inception." *Id.*[15] In fact, in January 2000, more than one year before it approved the Settlement, the district court had concluded that this action and Government's Membership Rules – the precursor to Membership Rules – alleged common claims. *In re Visa Check/Master Money Antitrust Litig.*, 190 F.R.D. 309, 312, 315 (E.D.N.Y. 2000). Finding that Government's Membership Rules involved "essentially the same issues" as the case at bar, Judge Gleeson granted the Government's motion to intervene so that plaintiffs' discovery could be used to assist the Government in its case. *Id.* at 315; *see id.* at 315 n.3 (describing the Government's contention that the exclusionary rules were a common issue between both cases).

NuCity stresses the difference between the elements of an antitrust tying case – this case – and a horizontal boycott case – *Membership Rules* – to argue that the same factual predicate does not underlie both. Specifically, NuCity argues that

> [p]laintiffs' own description of their damage theory indicates that the damages they sought to

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[15] In describing the exclusionary rules, the complaint alleged that:

> Visa members collectively adopted a rule barring their members from issuing any plastic cards competitive with Visa cards. This rule exempted MasterCard, permitting Visa's dual members to continue issuing MasterCard plastic cards. Visa members then turned around and, acting as MasterCard members, adopted the same non-competition rule. The effect of these rules was to deprive existing and new competitors of a marketing outlet at the 6,000 largest and most appropriate vendors of their products., *i.e.*, the dual bank members of Visa and MasterCard.

2d Am. Compl. ¶ 50. Another part of the complaint alleged that Visa and MasterCard asked members to boycott American Express and Discover cards. *Id.* ¶¶ 52-54.

> recover stemmed from the effects of the illegal tying arrangement and [the effects] other associated anticompetitive conduct (which may or may not include the exclusionary rules) had in retarding the development of "regional *debit* networks" from entering the market – not the exclusion of major competing *credit* card brands like American Express and Discover.

NuCity Br. at 31 (emphasis added).

NuCity misses the mark. When considering the permissibility of a release, the overlap between elements of *claims* is not dispositive. Class actions may release claims, even if not pled, when such claims arise out of the same factual predicate as settled class claims. *TBK Partners*, 675 F.2d at 460; *see In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. Apr. 1981) ("[A] court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint." (quoting *Patterson v. Stovall*, 528 F.2d 108, 110 n.2 (7th Cir. 1976)).[16]

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[16] NuCity also argues that the parties' conduct prior to settlement displays their clear understanding that the *Membership Rules* claims and the instant claims were distinct. As proof, NuCity highlights the fact that defendants did not move to consolidate *Membership Rules* and this action pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407, or to dismiss one of the cases on the ground that one cause of action had been split into two cases. NuCity's retelling of the procedural facts is not accurate. In fact, class plaintiffs sought collateral estoppel against defendants based on the guilty verdict in *Government's Membership Rules*, *see* Status Conference Transcript, dated June 21, 2002, and the district court chose to delay briefing and argument on the estoppel issue until *Government's Membership Rules* was concluded on

(Continued on following page)

Based on the foregoing, the district court did not abuse its discretion by concluding that the claims in Membership Rules are based on the identical factual predicate as the claims in this case.

2. Identical Factual Predicate Doctrine Permits Release of Non-Parties

Even though the *Reyn's* claims may be released with respect to Visa and MasterCard, Pasta Bella objects to the release of the member banks, since they were not parties to this action. However, "class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002); *see, e.g., In re Holocaust Victims Assets Litig.*, 105 F. Supp. 2d 139, 143, 160-65 (E.D.N.Y. 2000) (approving class settlement with broad releases against non-parties, including insurance carriers, other banks, and Swiss governmental entities); *see also* 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 12:16, at 318 (4th ed. 2002) ("NEWBERG") ("A settlement may . . . seek to discharge parties who have not been served with process and are therefore not before the court."). The district court did not, therefore, err by finding that the non-party banks

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appeal, Order, dated June 24, 2002. Since this Circuit decided the appeal of *Government's Membership Rules* months after the parties signed the settlement agreement, the need to brief the estoppel issue never arose. *See Government's Membership Rules*, 344 F.3d 229 (publishing decision on September 17, 2003).

could be released from liability for conduct premised on the identical factual predicate of claims alleged in this action.

The banks' settlement contributions further support the district court's conclusion. The banks "not only contributed to the Settlement[], but virtually all of the relief comes from them." *Visa Check III*, 297 F. Supp. 2d at 514. They agreed to lower temporarily their interchange rates, notify merchants of the cessation of the tying arrangement, and reconfigure their debit cards. *Id.* Moreover, the banks' membership fees may contribute to the compensatory relief paid by Visa and MasterCard. *Id.* We cannot find that the district court abused its discretion by releasing nonparties, particularly where, as here, those nonparties are members of the defendants and have contributed to the settlement. Indeed, it is hard to imagine that defendants would have settled without also releasing their member banks from liability; to do so would have invited relitigation of the same factual allegations against the banks.

B. Due Process Requires that Released Claims be Adequately Represented[17]

A determination that all of the settled claims arose from the same factual predicate does not necessarily end the inquiry. Claims arising from a shared set of facts will

[17] "Due process requires adequate representation at all times throughout the litigation . . . . " *Stephenson*, 273 F.3d at 260 (internal quotation marks omitted). "Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process . . . . " *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998).

not be precluded where class plaintiffs have not adequately represented the interests of class members. On appeal, Pasta Bella interprets the adequacy of representation doctrine to require that "settled claims of absent class members [be] adequately represented as a matter of fact before they can be barred." Pasta Bella Br. at 23. Consequently, Pasta Bella presses that the Settlement inadequately represents the *Reyn's* claims because it does not require payment from the member banks who were defendants in *Reyn's*. In the same vein, NuCity argues that *Membership Rules* seeks damages for billions of dollars stemming from the boycott of credit cards, whereas the Settlement is based merely on damages stemming from alleged tying arrangements in the debit card market and the concomitant effect on interchange rates. Respondents counter that these arguments amount to baseless allegations that the plaintiffs "left significant claims on the table."[18] We agree. Adequate representation is not solely an assessment of effort. Rather, an examination of the interests of the settling plaintiffs and of the Settlement's effect on those who would be bound by it leads us to the conclusion that lead plaintiffs, who are also members of the classes led by Pasta Bella and NuCity, adequately represented the claims asserted in *Reyn's* and *Membership Rules* in this case.

As support for its claim that adequate representation requires vigorous pursuit of class claims, Pasta Bella cites *Stephenson*. *Stephenson* involved two Vietnam War veterans who sued several chemical manufacturers for Agent

[18] Since the interests of class counsel and defendants are, in essence, aligned in this appeal, both parties are collectively referred to as "respondents" in this opinion.

Orange-related injuries. Their injuries manifested after a $180 million class action settlement – involving the same manufacturers and similar allegations – was exhausted. *Stephenson*, 273 F.3d at 251-52. The settlement purported to resolve all future claims, but only provided for recovery for those individuals whose exposure-related death or disability was discovered prior to 1994. *Id.* at 260. Since the settlement covered class members who had not yet manifested injury, *id.* at 252; the defendants argued that the settlement barred the *Stephenson* plaintiffs from recovery, *id.* at 256. This Circuit held that the claims of the *Stephenson* plaintiffs had not been adequately represented in the earlier action because, at the time of the Agent Orange settlement, future claims had not been considered separate from claims involving current injury. *Id.* at 261 ("[A] class which purports to represent both present and future claimants may encounter internal conflicts."). Thus, the plaintiffs could proceed with their action. *Id.* at 258.

Stephenson is not directly on point, however, because that case involved future claimants, whereas this case does not. Here, injured parties may obtain remuneration from the settlement fund if they accepted Visa or MasterCard within a finite period – October 25, 1992 through June 21, 2003. *Visa Check III*, 297 F. Supp. 2d at 514 n.12, 519. Conduct occurring after December 31, 2003 is not precluded from being the subject of a future suit. *See supra* n.5 (quoting relevant portion of release). Thus, the essential question in determining whether the Settlement complies with the adequate representation doctrine is whether the interests that were served by the Settlement were compatible with those of Pasta Bella and NuCity

when plaintiffs negotiated a release of the *Reyn's* and *Membership Rules* claims.

National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir. 1981) ("*Super Spuds*"), guides the first step in our inquiry to determine whether class representatives impermissibly sacrificed the interests of current class claims in exchange for settlement. *Super Spuds* was a class action seeking damages for the loss in value to potato futures contracts as a result of the defendant's wrongful conduct. *Id.* at 11. The class was composed of plaintiffs who held liquidated long positions in potato futures. *Id.* However, a subset of the class also held unliquidated contracts. The subset did not receive additional settlement proceeds in exchange for the release of their unliquidated contracts. *Id.* at 16. We reversed approval of the settlement, holding that a settlement could not be fair where "a class member holding one liquidated and one unliquidated contract receives no more than another class member holding only one liquidated contract." *Id.* at 19.

Super Spuds is inapposite to the instant case, however, because *Super Spuds* hinged on the fact that the class representatives did not process the unliquidated futures. *Id.* at 17. On this basis, we held, "The named plaintiffs in a class action 'cannot represent a class of whom they are not a part.'" *Id.* (quoting *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam)). Here, every member of the *Reyn's* class and every member of the *Membership Rules* class is a member of the instant class. *See Visa Check III*, 297 F. Supp.2d at 514 n.12. Thus, the lead plaintiffs are necessarily a part of the *Reyn's* and *Membership Rules* classes and their interests are, therefore, aligned with the interests of those classes.

In *Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000), we considered whether a subset of a class can ever lack adequate representation when the lead plaintiffs of that class possess the claims of that subset. *Joel A.* arose when objectors to a class action settlement filed a separate class action for redress of the particular harms they claimed to have endured. The class in the first action, *Marisol A. ex. rel. Forbes v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) ("*Marisol A.*"), was composed of New York City children at risk of neglect or abuse. *Id.* at 669-72. The class in *Joel A.*, objectors in *Marisol A.*, was composed of homosexual children contending that the *Marisol A.* settlement discriminated against them. *Joel A.*, 218 F.3d at 137. In *Marisol A.*, plaintiffs alleged that the City and State of New York deprived them of appropriate child welfare services. After two years of discovery, the *Marisol A.* class negotiated settlement agreements that provided for a variety of administrative improvements designed to improve care for *all* class members. *Id.* at 137, 140-41. The settlement released the City and State of New York from related lawsuits for approximately two years. *Id.* at 137, 144. Dissatisfied with the general relief provided in the *Marisol A.* settlement, homosexual members of the *Marisol A.* class commenced *Joel A.* seeking redress of their particular grievances. *Id.* at 137-138. They argued that the *Marisol A.* settlement could not have adequately represented their interests because they were victims of "bias-related violence, harassment and discrimination at the hands of their heterosexual peers" in the class. *Id.* at 137-38. They sought "concrete relief for bias-related victimization by their peers[] and systemic discrimination based on sexual orientation." *Id.* (internal quotation marks omitted).

The *Joel A.* panel found that the *Marisol A.* class adequately represented the *Joel A.* class. *Id.* at 144. While the remedy contemplated in the *Marisol A.* settlements was broader than the relief sought by the *Joel A.* subclass, the remedy provided in the *Marisol A.* settlement was "likely to deal with these complaints." *Id.* at 142. We held that "our precedents do not dictate that the settlement be invalidated because [the *Joel A.* class] claims are subsumed within a more generalized claim." *Id.* That is precisely the case here.

NuCity hopes that *In re Auction Houses Antitrust Litigation*, No. 00-Civ.-0648, 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001) ("*Auction Houses*"), *aff'd* 42 Fed. Appx. 511 (2d Cir. 2002), will persuade us that *Joel A.* does not end our inquiry into the adequacy of representation.[19] In *Auction Houses*, auction patrons filed class actions against auction houses that allegedly conspired to fix auction terms. *Id.* at *1. Shortly before – the parties reached settlement, new class actions arose involving foreign auctions affected by the same alleged conspiracy. *Id.* at *2. Thereafter, the parties to the initial action reached a settlement that included a release of all claims that could be brought in U.S. courts or foreign courts under U.S. law. *Id.* at *2-*3, *11. Realizing that the proposed settlement would preclude U.S.-law claims involving foreign auctions, the district court refused to approve the settlement as long as it required the release of those claims. *Id.* at *18. The court reasoned that a class could not settle its claims by sacrificing other claims of class members that "were not within the description of claims assertable by the class."

[19] Pasta Bella did not raise this argument.

Id. at *12 (quotation marks omitted). "[T]he key point is that an expanded release requires the allocation of at least some of the settlement consideration to the holders of the claims prejudiced by the expansion unless the class action judgment would bar the released claims by application of principles of former adjudication." *Id.* at *13.[20]

Respondents, however, distinguish *Auction Houses*, and, for that matter, *Super Spuds*, by explaining that, in those cases, marginalized groups did not receive any benefit in exchange for the releases contemplated, whereas here, every claimant in *Membership Rules* benefits from the settlement. *Visa Check III*, 297 F. Supp. 2d at 514. They argue, therefore, that the central issue in determining adequacy of representation is the alignment of class members' interests. Since Wal-Mart, the world's largest retailer, and other large and sophisticated lead plaintiffs, such as The Limited, Sears, and Safeway, stood to gain from damages for the *Membership Rules* claims, respondents contend there is no basis to conclude that plaintiffs did not seek to obtain the best settlement by obtaining the highest possible amount for the exclusionary rules claims.

A recent Eighth Circuit case, *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800 (8th Cir. 2004) ("*General American*"), supports respondents' position. In *General American*, plaintiff brought an action in the state court of New Mexico against General American Life

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[20] By the time it issued its opinion, the district court had already dismissed the foreign auction claims, *see id.* at *11, leaving only the opportunity to bring those claims in foreign courts. Concluding that the foreign auction claims therefore lacked significant value, the district court nonetheless refused to approve even this minimal sacrifice without due consideration. *Id.*

Insurance Company even though she had participated in a class action (the "*General American Class Action*") against the same defendant in the Eastern District of Missouri that obtained a minimum of $55,000,000 in settlement proceeds. *Id.* at 802. The *General American* plaintiff brought her action against the insurer based on alleged omissions and non-disclosures concerning particular aspects of its billing procedures, while the *General American Class Action* had pursued recovery for more general claims concerning the same conduct. *Id.*

The Eighth Circuit found that the language used in the class action settlement agreement encompassed the *General American* plaintiff's state court claims as a subset of the claims released. *Id.* at 803. Since the notice to the class in *General American Class Action* was clear and fair – providing class members the opportunity to opt out if they wished – the court found that releasing certain claims was not problematic. *Id.* Thus, the court affirmed the dismissal of *General American* plaintiff's claim on the ground that the *General American Class Action* settlement agreement and the class notice clearly articulated a release of future claims. *Id.* at 803. In light of the valid and "very broad" settlement release in the class action, which included known and unknown causes of action, the court held that "[w]e have no difficulty in concluding that the [class] judgment bars the New Mexico action." *Id.* The court articulated the give-and-take nature of the settlement process and the court's role in scrutinizing the efforts of lead plaintiffs:

> The release of [a particular] category of claims was one of a series of benefits conferred on the defendant by the class as part of the settlement. On the other side, defendant conferred benefits

> on the plaintiff class, including a monetary settlement, from which the plaintiff in this [related] case has benefitted, and a . . . procedure that could produce additional relief. No part of the consideration on either side is keyed to any specific part of the consideration of the other. Each side gives up a number of things. This is the way settlements usually work. It was the judgment of the class representative that [a particular category of claims], known and unknown, was a proper thing to give up to obtain the benefits offered by [the defendant]. . . . [W]e have no way to criticize the judgment of the class representative. Accordingly, we hold that the representation afforded was adequate, and that the provisions of Fed. R. Civ. P. 23 were fully met.

Id. at 805.

The Eighth Circuit's analysis of the settlement process is especially compelling here, where class representatives possessed the released claims and did not agree to preclude lawsuits arising out of similar conduct in the future. We agree with respondents that due process does not require that all class claims be pursued. Instead, where different claims within a class involve the identical factual predicate, adequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim. Thus, the district court did not err in ruling that plaintiffs' release of the *Reyn's* and *Membership Rules* claims did not violate due process, where plaintiffs are members of the *Reyn's* and *Membership Rules* classes and the release was part of the consideration necessary to obtain the largest antitrust settlement in history. *Visa Check III*, 297 F. Supp. 2d at 508, 524; *see Joel A.*, 218 F.3d at 142 (release may include

"claims [that] are subsumed within a more generalized claim").[21]

Like the plaintiff in *General American*, who complained that "the class representative gave away all modal-billing claims (in the release) and received nothing in exchange for them," 357 F.3d at 805, Pasta Bella and NuCity seek greater compensation for the claims asserted in their respective lawsuits. Their contention that they were inadequately represented is more appropriately cast as a challenge to the Settlement's fairness than as a due process claim, since their positions are grounded in the notion that the Settlement resulted in a class recovery that was too low.

PART II
NOTICE TO CLASS MEMBERS WAS ADEQUATE

The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); Fed. R. Civ. P. 23(e). There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)

[21] Defendants argue that the release is "no broader than the effect of *res judicata* from the district court's judgment." Case No. 04-0344, Defs. Br. at 31 n.11; Case No. 04-1052, Defs. Br. at 33 n.16. We need not consider this argument because we conclude that the Settlement validly released the non-party banks.

(internal quotation marks and brackets omitted). Notice is "adequate if it may be understood by the average class member." 4 NEWBERG § 11:53, at 167.

A. Pasta Bella Received Adequate Notice

Since the class notice did not name the banks as parties and the settlement notice did not specifically inform class members that the *Reyn's* claims would be included in the Settlement, Pasta Bella argues that it was denied due process because class members were not given the opportunity to opt out after the settlement notice was issued. Although Pasta Bella forfeited this contention by failing to preserve it at the district court, *see Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 142 (2d Cir. 2000), we note that even if it had been preserved, the argument cannot prevail. The Ninth Circuit's decision in *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992), is directly on point. That case involved class action claims arising from the default of $2.25 billion in bonds issued to finance power plants in the State of Washington. *Id.* at 1273. Pursuant to a settlement between the parties, the State obtained a release in that action even though it was not a party and was not mentioned in the notice of pendency. *Id.* at 1288, 1290-91. On appeal, the Ninth Circuit affirmed the district court's approval of settlement by determining that a federal court may release a claim "based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action.*" *Id.* at 1287 (quoting *TBK*, 675 F.2d at 460 (emphasis added in *Class Plaintiffs*)). Since the parties had been given notice of the action, the opportunity to opt out, notice of the proposed settlement, and the

opportunity to object, the court held that it was not required to grant those who objected to the proposed settlement a second opportunity to opt out. *Id.* at 1289.

Here, although the member banks were not named as defendants, the complaint described "[a]pproximately 4,400 banks that have issued Visa and/or MasterCard credit cards and also issued *Visa Check* and/or *MasterMoney* debit cards" as co-conspirators. 2d Am. Compl. ¶ 32. The notice of pendency, which incorporated the allegations in the complaint, alleged a conspiracy between Visa, MasterCard, and "their member banks." Notice of Pendency ¶ 3. Attempting to distinguish the *Reyn's* claims from those in the instant action, Pasta Bella's amended complaint in *Reyn's* states, "Plaintiffs do not contest in this action, as averred in other litigation, any tying arrangement, of the VISA and MASTERCARD debit charges with other charges." *Reyn's* 1st Am. Compl. ¶ 11. Yet, Pasta Bella's attempt to distinguish the claims in *Reyn's* from the claims in the instant action does not alter the fact that the claims in both cases arise out of the identical factual predicate. Indeed, Pasta Bella's artful language belies its recognition of the potential for overlap between the two lawsuits. Thus, Pasta Bella cannot reasonably argue that it was not on notice of the possibility that, pursuant to settlement in this action, the banks would be released from future claims. Pasta Bella was required to opt out at the class notice stage if it did not wish to be bound by the Settlement.

B. NuCity Received Adequate Notice

NuCity argues that the settlement notice denied the Membership Rules class due process because it failed to disclose:

1. the judgment against Visa and MasterCard in *Government's Membership Rules*;

2. the pending claims in *Membership Rules*;

3. the prospect that the Settlement's contemplated release would extinguish all claims in *Membership Rules*;

4. the value attributed by plaintiffs' counsel to the *Membership Rules* claims; and

5. the value received by the class in exchange for release of the *Membership Rules* claims.

NuCity points to the notice of settlement in *Auction Houses* and argues that the settlement notice in this case comes up short. In *Auction Houses*, the notice explicitly informed class members that the settlement would permanently bar them from pursuing claims based on auctions held outside the U.S., and that class members with potential claims arising out of foreign auctions "should consider whether or not to forego the benefits of the proposed settlement." *Auction Houses*, 2001 WL 170792, at *3. In this case, NuCity asserts that the need to include cautionary language in the settlement notice was especially great, since the notice of pendency also lacked an explanation of the action's impact on *Membership Rules*. NuCity further asserts that since the *Membership Rules* class was not yet certified, *see supra* note 8, claimants could not have been expected to intuit that their *Membership Rules* claims would be released by the Settlement. Thus, NuCity contends class members did not know they were releasing live claims in an already-filed action seeking billions in damages when they neglected to opt out of the class or object to the Settlement.

Underscoring the need for additional disclosure, NuCity relies on *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) ("*Nissan Motor*"), where the Fifth Circuit found that the class notice serves as the class members' primary, if not exclusive, source of information for deciding how to exercise their rights under rule 23." *Id.* at 1104. *Nissan Motor* required that class members be given "information reasonably necessary to make a decision [whether] to remain a class member and be bound by the final judgment or opt out of the action," though the notice need not include "every material fact" or be "overly detailed." *Id.* at 1104-05. In light of this standard, the Fifth Circuit held that, where a partial settlement was proposed between plaintiffs and a group of defendants before notice of a class action had been sent to class members, the notice must apprise class members of the proposed partial settlement, because the relief obtained in the proposed settlement would be an "essential factor" in an absent class member's decision whether to opt out of the class. *Id.* at 1105.

In this case, the settlement notice quoted verbatim the Settlement's release. Respondents argue that (1) the law does not require parties to describe pending actions covered by a release in a proposed settlement notice, and, in any event, (2) quoting a release word for word in the settlement notice is sufficient to inform class members of the scope and effect of the release. In support of its approval of the settlement notice, the district court relied on *Weinberger*, 698 F.2d at 70, for the proposition that the law merely requires a class notice to describe effectively the scope of a release. *Visa Check III*, 279 F. Supp. 2d at 516. Since the release was quoted in its entirety, the court concluded that "the expansive reach of the release[] could

not have been clearer. This is all that was required." *Id.* We agree with the district court and do "not believe that due process requires further explanation of the effects of the release provision in addition to the clear meaning of the words of the release." *O'Brien v. Nat'l Prop. Analysts Partners*, 739 F. Supp. 896, 902 (S.D.N.Y. 1990). *Accord Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1317-18 (3d Cir. 1993); *Maher v. Zapata Corp.*, 714 F.2d 436, 452-53 (5th Cir. 1983).[22]

C. Armenta's Lacks Standing to Challenge its Notice

Armenta's appeals the district court's approval of the Settlement on the ground that the English-only Settlement Documents violated due process and Federal Rule of Civil Procedure 23 because an identifiable class – Spanish-speaking class members who could not read and understand the English-only Settlement Documents – was not afforded notice.[23]

Armenta's does not provide sufficient evidence that it represents an identifiable subclass of claimants who could not comprehend the Settlement Documents. While the representatives of the purported subclass describe a significant preference for Spanish, they do not claim that

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[22] We note, however, that class notices do sometimes include specific reference to pending actions. *See, e.g., Auction Houses*, 2001 WL 170792, at *3-4; *Fradette v. Am. Serv. Corp.*, No. 76-6373-Civ-CA, 1979 WL 1756, *1 (S.D. Fla. Aug. 29, 1979) (finding information concerning "related litigation" in class notice to be material to a reasonable person). Obviously, this information is helpful to class members. We strongly encourage the inclusion of such information in the future.

[23] As previously defined, "Settlement Documents" is the term used in this opinion to refer collectively to the settlement notice and the summary notice.

they cannot read English or that they cannot conduct business in English. *See* Armenta Aff. ¶¶ 4-5; Martinez Aff. ¶¶ 4-5. Further, the statistics provided by Armenta's to the district court – statistics concerning the number of Spanish-speaking families and businesses in the United States – even if taken as true, do not establish that Spanish-speaking class members could not understand the Settlement Documents. Thus, we do not find error in the district court's conclusion that "a lack of comfort [in the English language] does not mean there was a significant defect in the notice." *Visa Check III*, 297 F. Supp. 2d at 517.

PART III
THE SETTLEMENT IS FAIR

A. The Settlement is Entitled to a Presumption of Fairness

A court may approve a class action settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Joel A.*, 218 F.3d at 138. A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Manual for Complex Litigation, Third*, § 30.42 (1995). We are mindful of the "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998). "The compromise of complex litigation is encouraged by the courts and favored by public policy." 4 NEWBERG § 11:41, at 87.

In the instant case, the district court rightly praised the efforts of plaintiffs' lead counsel. *Visa Check III*, 297 F. Supp. 2d at 524. "Constantine & Partners is a premiere plaintiffs' litigation firm, specializing in antitrust litigation particularly and complex commercial litigation generally." *Id.* Counsel for the class took and defended approximately 400 depositions, including 21 expert depositions, and reviewed more than 5 million pages of documents during approximately seven years of litigation, *id.* at 507-08, 511 n.8. Clearly, counsel conducted meaningful discovery. Of course, "the quality of representation is best measured by results." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 55 (2d Cir. 2000). Here, plaintiffs' counsel "produced the largest antitrust settlement ever." *Visa Check III*, 297 F. Supp. 2d at 524. The Settlement includes $3,383,400,000 in compensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more. *Id.* at 509, 512. According to settlement mediator Eric Green, "the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties." Green Decl. ¶ 12. Concluding that "there could not be any better evidence of procedural integrity" than the aggressive litigation spanning nearly a decade and the impassioned settlement negotiations that produced an agreement on the brink of trial, the district court affirmed Green's sentiments by finding that "[c]ollusion or coercion could not conceivably have tainted the process." *Visa Check III*, 297 F. Supp. 2d at 510.

We agree with this assessment and conclude that the district court did not abuse its discretion in determining that a presumption of fairness arose.

B. The Settlement is Substantively Fair

When reviewing a district court's approval of a settlement, a "trial judge's views are accorded 'great weight . . . because he is exposed to the litigants, and their strategies, positions and proofs. . . . Simply stated, he is on the firing line and can evaluate the action accordingly.'" *Joel A.*, 218 F.3d at 139 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 454 (2d Cir. 1974)).

In this Circuit, courts examine the fairness, adequacy, and reasonableness of a class settlement according to the "*Grinnell* factors." *Id.* at 138. The factors are:

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery;

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted).

1. Complexity, Expense and Likely Duration of Litigation

Federal antitrust cases are complicated, lengthy, and bitterly fought. *See Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y.1989). "Few areas of federal antitrust law are more confusing than the law that governs tying arrangements." Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213, 213 (1983). The district court concluded that this case would have taken three months to try and several years for appellate review. *Visa Check III*, 297 F. Supp. 2d at 510. None of the appellants argue that this case was uncomplicated or would have resulted in a short trial.

2. Reaction of the Class to the Settlement

On the whole, the class appears to be overwhelmingly in favor of the Settlement. Only eighteen class members out of five million objected to the Settlement. *Id.* at 511. "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." 4 NEWBERG § 11.41, at 108; *see also D'Amato*, 236 F.3d 78, 86-87 (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement). This Court is certainly aware that "[l]ack of objection by the great majority of claimants means little when the point of objection is limited to a few whose interests are being sacrificed for the benefit of the majority." *Super Spuds*, 660 F.2d at 16. But here, the absence of substantial opposition is indicative of class approval, since every member of the class in *Reyn's* and Membership Rules is also a member of the instant class.

3. Stage of Proceedings and Amount of Discovery Completed

"If all discovery has been completed and the case is ready to go to trial, the court obviously has sufficient evidence to determine the adequacy of settlement." 4 NEWBERG § 11:45, at 129. Here, plaintiffs entered into settlement only after a thorough understanding of their case. As noted earlier, extensive discovery proceedings spanning over seven years and millions of pages of documents preceded the Settlement. *Visa Check III*, 297 F. Supp. 2d at 511 n.8. The parties also underwent summary judgment proceedings and mediation before they struck a deal at the courthouse steps. *Id.* at 508, 511. Certainly, a substantial amount of work had been completed, leaving relatively few unknowns prior to trial.

4. Risks of Class Prevailing (Establishing Liability, Establishing Damages, Maintaining the Class through Trial)

Characterizing the defendants' "Honor All Cards" policy as having at least some pro-competitive features, the district court concluded that establishing liability "was no sure thing" for the plaintiffs. *Id.* at 511. "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998); *see, e.g., United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("[T]he jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages as a result of the NFL's unlawful conduct."), *aff'd*, 842 F.2d 1335,

1377 (2d Cir. 1988). That said, we must acknowledge that the Government's successful prosecution of Government's Membership Rules improved plaintiffs' likelihood of success in this case. Yet, on balance, it is certainly fair to conclude that even if the plaintiffs had prevailed in establishing their tying claim, they would have faced significant challenges in proving damages. *Visa Check III*, 297 F. Supp. 2d at 511.[24]

5. Ability of Defendants to Withstand a Greater Judgment

The compensatory relief provided in the Settlement constitutes "the largest settlement ever approved by a federal court." *Id.* (quoting plaintiffs' expert Professor John C. Coffee, Jr. of Columbia University Law School). Additionally, the injunctive relief – valued at approximately $25 to $87 billion or more, *id.* at 511-12 – adds great value to the Settlement. Yet, Pasta Bella insists that a settlement requiring payment from the banks could have been substantially higher. We cannot agree with this argument. It is hardly surprising that the district court did not make explicit findings with respect to the ability of the member banks to withstand a significantly greater damages award, since the banks are not defendants in this case. Even if such a finding were helpful, our concern about financial resources of member banks would be assuaged by the district court's finding that virtually all of the relief in the Settlement already comes from the banks. *Id.* at 514.

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[24] The record does not include evidence concerning the likelihood of maintaining the class through trial, though decertification is always possible as a case progresses and additional facts are developed. *See Visa Check II*, 192 F.R.D. at 89.

6. Range of Reasonableness of Settlement Fund in Light of Best Possible Recovery and Attendant Risks of Litigation

> [T]here is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion – and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972). Here, the statistics concerning the Settlement are staggering: the compensatory relief by itself constitutes the largest settlement ever approved by a federal court; the injunctive relief will save the class $25 to $87 billion or more. Since the district court found that experienced and able counsel fought this litigation "aggressively" and "negotiated feverishly," *Visa Check III*, 297 F. Supp. 2d at 510, and that "virtually all of the relief comes from" the banks, *id.* at 514, there is little reason to believe that additional money would have been put into the settlement pot had the banks been named as parties. The banks' participation in the settlement speaks volumes of their stake in the litigation. Moreover, given that the *Reyn's* and *Membership Rules* plaintiffs are substantially similar to the instant plaintiffs, it cannot be said that the settlement fund was unreasonably small or particularly unfair to a subset of plaintiffs.

Indeed, the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry. Having considered this factor along with the others, we conclude

that the district court did not err in finding the Settlement substantively fair.[25]

C. NuCity is Not Entitled to Discovery

NuCity appeals the district court's denial of its motion for limited discovery to examine whether the Settlement included consideration for claims asserted in *Membership Rules*, the value attributed to claims foregone, and the justification for such valuation. Generally, such a discovery request depends on "whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold an additional hearing on the settlement or to give appellants authority to renew discovery." *Grinnell*, 495 F.2d at 462-63.

As noted by the *Grinnell* analysis described above, the district court possessed an abundance of facts to make a fairness determination. Plaintiffs were not required to bargain separately for relief in exchange for the *Membership Rules* claims. "No part of the consideration on either side is keyed to any specific part of the consideration of the other. Each side gives up a number of things. This is the way settlements usually work." *General American*, 357 F.3d at 805. Thus, the district court did not abuse its discretion in denying NuCity's discovery motion.

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[25] By failing to plead it at the district court, Pasta Bella forfeited its argument that the Settlement perpetuated illegal price-fixing because it set a fixed interchange rate during the period from August 1, 2003 through December 31, 2003. *See Krumme*, 238 F.3d at 142.

D. The Parties are Not Judicially Estopped from Including the *Reyn's* Claims in the Settlement

Northern District of California Local Rule 3-13 provides that:

> Whenever a party knows or learns that an action filed or removed to this district involves all or a material part of the same subject matter and all or substantially all of the same parties as another action which is pending in any other federal . . . court, the party must file with the Court in the action pending before this Court . . . a Notice of Pendency of Other Action. . . .

N.D. Cal. Civil L.R. 3-13(a). Instead of filing the required notice in the Northern District of California, Visa and MasterCard settled the instant action and then sought to dismiss *Reyn's* on the ground that the claims in that case were barred by the Settlement. Pasta Bella argues that Visa and MasterCard knowingly violated Northern District of California Local Rule 3-13 to escape liability for the conduct alleged in *Reyn's*. According to Pasta Bella, if the actions are related, then compliance with Rule 3-13 would have caused *Reyn's* to have been transferred to the Eastern District of New York and consolidated with the instant action. *See* N.D. Cal. Civil L.R. 3-13(b)(3)(B); *cf.* 28 U.S.C. § 1407 (providing a mechanism for the transfer of "civil actions involving one or more common questions of fact" pending in different districts "for coordinated or consolidated pretrial proceedings"). Pasta Bella contends that if *Reyn's* had been consolidated with this action, the class recovery would have been higher. Thus, Pasta Bella urges us to estop Visa and MasterCard from benefitting from their failure to comply with the Northern District of California's local rules.

We have previously held that "judicial estoppel applies only when a tribunal in a prior separate proceeding has relied on a party's inconsistent factual representations and rendered a favorable decision." *Adler v. Pataki*, 185 F.3d 35, 41 n.3 (2d Cir. 1999) (emphasis omitted); *see also Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 118 (2d Cir. 2004). We need not determine whether defendants' alleged failure to file a notice of pendency constituted "inconsistent factual representations," for there is no evidence that the Northern District of California relied on that failure and "rendered a favorable decision." Estoppel is therefore inappropriate here.

PART IV
THE DISTRICT COURT'S FEE AWARD IS REASONABLE

At the district court, lead counsel for the plaintiffs sought a fee of $609,012,000 – approximately 18% of the present value of the Settlement's compensatory relief, 2.14% of the present value of the Settlement (inclusive of injunctive relief), and 9.68 times the lodestar figure of $62,940,045.84.[26] *Visa Check III*, 297 F. Supp. 2d at 522. Seventeen merchants objected to counsel's fee petition. *Id.* at 509 n.6, 522 n.27. The court found the fee petition excessive despite the excellence of plaintiffs' representation, *id.* at 522, 524. Assessing the fee petition with a careful eye for the interests of all class members, the court awarded fees in the amount of $220,290,160.44 plus an additional $18,716,511.44 in costs and expenses. *Id.* at

[26] The district court described the fee award as "9.68% times the lodestar figure." *See Visa Check III*, 297 F. Supp. 2d at 522. This is clearly a typographical error.

507, 524-26. Leonardo's argues that the district court's fee award was too high, while Constantine & Partners ("C&P"), plaintiffs' lead counsel, contends that the fee award was too low.

A. "Percentage of the Fund" is an Appropriate Method

The district court utilized the "percentage of the fund" method to calculate attorneys' fees. *Visa Check III*, 297 F. Supp. 2d at 524. Courts may award attorneys' fees in common fund cases under either the "lodestar" method or the "percentage of the fund" method. *See Goldberger*, 209 F.3d at 50. The lodestar method multiplies hours reasonably expended against a reasonable hourly rate. *Id.* at 47. Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys. *Id.* The trend in this Circuit is toward the percentage method, *Visa Check III*, 297 F. Supp. 2d at 520, which "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *25. In contrast, the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, No. 96 Civ. 0583, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002) (internal quotation marks omitted).

B. The *Goldberger* Factors Confirm the Reasonableness of the Fee Award

Irrespective of which method is used, the "*Goldberger* factors" ultimately determine the reasonableness of a common fund fee. They include:

(1) the time and labor expended by counsel;

(2) the magnitude and complexities of the litigation;

(3) the risk of the litigation . . . ;

(4) the quality of representation;

(5) the requested fee in relation to the settlement; and

(6) public policy considerations.

Goldberger, 209 F.3d at 50 (citation omitted); *see, e.g., Baffa*, 2002 WL 1315603, at *1 ("district courts should continue to be guided by the [*Goldberger* factors]"). Recognizing that economies of scale could cause windfalls in common fund cases, courts have traditionally awarded fees for common fund cases in the lower range of what is reasonable. *Goldberger*, 209 F.3d at 52; *see also In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689, 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003) ("[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent.").

The district court concluded that the *Goldberger* factors compel an "extraordinary" fee under these circumstances: lead counsel devoted tremendous time and labor to this case for seven years; antitrust cases, by their nature, are highly complex; this case was especially large and complicated, involving almost every U.S. bank and more than five million U.S. merchants; the risk of the litigation was very high; lead counsel devoted 52% of its legal staff to work on a case that spanned seven years without any guarantee of recovery; plaintiffs' counsel achieved extraordinary results; plaintiffs' counsel did not have the benefit of "piggybacking" off of a previous case – instead, the Government piggybacked off of plaintiffs' counsel's work by using it in *Government's Membership Rules*; even a very large fee award would be a small percentage of the settlement fund; and the Settlement produced "significant and lasting benefits for America's merchants and consumers." *Visa Check III*, 297 F. Supp. 2d at 523-24. Asserting its jealous regard for absent class members, the court sought to compensate plaintiffs' counsel handsomely and at the same time limit the percentage of the award so that plaintiffs' counsel would not receive a windfall detrimental to the class:

> Were the Fund not so large, dwarfing the funds in all of the cases Lead Counsel have cited, a larger percentage might be appropriate. But given the circumstances as they are, my award is appropriate. Only in comparison to the amount sought can it be considered anything but generous.

Id. at 525 (footnote omitted). C&P argues that the district court's fee award was insufficient because (a) the fee award provides a meager percentage of the settlement

fund and (b) the fee award reduces the incentive to class lawyers to seek maximum relief.

1. The Fee Award is Based on a Reasonable Percentage of the Fund

C&P cites *In re Linerboard Antitrust Litigation*, No. MDL 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004) ("*Linerboard*"), in support of its argument against a declining percentage approach to large fee awards. In that case, the court found that "the sliding scale approach is economically unsound." *Id.* at *17. The *Linerboard* court explained that it is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws. *Id.* C&P contends that not only was the court's percentage award low, but also the court did not adequately compensate counsel for the substantial injunctive relief it obtained for the class. Thus, C&P argues that the district court's fee award severely inhibits the strong public policy articulated in *Linerboard* that favors providing incentives to attorneys to pursue maximum relief for their clients.

We need not dispute whether the sliding scale approach is economically rational in the context of ensuring competent and committed counsel. Public policy concerns oftentimes redefine the focus of the court. In this case, the district court's decision in favor of protecting the instant class from an excessive fee award militates against awarding attorneys' fees based purely on economic incentives. Satisfied that its ruling would not deter plaintiffs' attorneys from pursuing similar claims, the district court remarked, "If [this fee award] amounts to punishment, I

am confident there will be many attempts to self-inflict similar punishment in future cases." *Visa Check III*, 297 F. Supp. 2d at 525. We agree.

While courts in megafund cases often award higher percentages of class funds as fees than the district court awarded in this instance, *see id.* at 525 n.33, the sheer size of the instant fund makes a smaller percentage appropriate. As a "cross-check" to a percentage award, courts in this Circuit use the lodestar method. *Goldberger*, 209 F.3d at 50. Here, the lodestar yields a multiplier of 3.5, which has been deemed reasonable under analogous circumstances.[27] *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (finding lodestar multiplier of 1.35 to 2.99 common in megafunds over $100 million); *NASDAQ Market-Makers*, 187 F.R.D. at 489 ("multipliers of between 3 and 4.5 have become common") (internal quotation marks omitted). Thus, the district court did not abuse its discretion in awarding plaintiffs' counsel a generous fee based on a somewhat low percentage of the fund.

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[27] As noted in subsection A of this Part, the lodestar method calculates attorneys' fees by multiplying hours reasonably expended against a reasonable hourly rate; courts may use their discretion to increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys. Here, the lodestar calculation yields $62,940,045.84, *Visa Check III*, 297 F. Supp. 2d at 522, which is approximately 29% of the district court's award of $220,290,160.44 to class counsel, *id.* at 507.

2. The District Court Was Not Required to Adhere to the Fee Agreement Between Plaintiffs' Counsel and Lead Plaintiffs

Plaintiffs' counsel argues that the district court was aware that class counsel had negotiated a fee arrangement with five of the nation's largest merchants that exceeded the 18% fee class counsel requested from the court and far exceeded the fee the court awarded.[28] Thus, class counsel argues that the district court ignored the *Goldberger* proviso that "market rates, where available, are the ideal proxy for [class counsel's] compensation." *Goldberger*, 209 F.3d at 52. As further proof of class satisfaction with counsel's fee request, counsel argues that none of the large and sophisticated merchants in this class action objected to its fee petition. *But see Goldberger*, 209 F.3d at 53 ("[Class members] have no real incentive to mount a challenge that would result in only a minuscule *pro rata* gain from a fee reduction.") (internal quotation marks omitted). For the reasons discussed in the prior subsection, we cannot say that the district court abused its discretion merely because it chose not to heed the terms of an agreement purportedly reached between lead plaintiffs

[28] This argument is based on an assertion made by Lloyd Constantine, managing partner of Constantine & Partners, lead counsel, in a declaration submitted to the court. In that declaration, Mr. Constantine stated, "I declare that the fee arrangement embodied in [the retention agreements C&P has with its large merchant clients] is much less favorable to the Class than the fee for which C&P has applied on behalf of itself and the 29 other Class Counsel firms." Constantine Supp'l. Decl. ¶ 8. Mr. Constantine offered to make these agreements available to the court for an inspection *in camera*. *Id.*

and their counsel when settlement payments to approximately five million absent class members are at stake.[29]

A final word is in order here. Measuring the difficulties of a large antitrust action and the degree of success by counsel in forging a settlement is not an easy task. In our view, the district court carried out its responsibility with admirable care and thoroughness, and with an eye to a just result. There is no doubt this case dominated the lives of all involved for many years. In approving the district court's fee award, we recognize the sacrifice and commitment plaintiffs' counsel made to its clients while preserving as much as possible for those who were harmed.

CONCLUSION

The settlement release is enforceable against the claims in *Reyn's* and *NuCity* because the claims in those cases arose out of the identical factual predicate as the claims in this case and were adequately represented here. The settlement notice was adequate because it fairly apprised members of the terms of settlement, including

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[29] At the district court, Leonardo's failed to contest class counsel's fee petition. "The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal." *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977). The Special Master found only one sentence addressing the fee petition in Leonardo's ten page brief objecting to the Settlement. That sentence asked the court to "carefully consider the amount of attorneys' fees and expenses requested by class counsel, an issue which Objectors expressly reserve for further argument when the matter of fees is considered." Special Master's Report and Recommendation, at 18. The record is clear: Leonardo's did not preserve for appeal its challenge to the fee award.

the scope of the release. Under a *Grinnell* analysis, the Settlement is fair. As a result, NuCity is not entitled to discovery. Judicial estoppel is not appropriate here, where the defendants did not benefit from any concealment. The district court's fee award is reasonable, as confirmed by the *Goldberger* factors.

We **AFFIRM** the district court in all respects.

297 F.Supp.2d 503

United States District Court,
E.D. New York.

In re VISA CHECK/MASTERMONEY ANTITRUST LITIGATION
This Document Relates to All Actions:

No. 96 CV 5238(JG).

Dec. 19, 2003.

Lloyd Constantine, Robert L. Begleiter, Constantine & Partners, P.C., New York City, Lead Attorneys for Plaintiff Class.

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Kevin J. Arquit, Joseph F. Tringali, Simpson Thacher & Bartlett LLP, New York City, Kenneth A. Gallo, Clifford Chance LLP, Washington, DC, for Defendant MasterCard International Incorporated.

Lawrence W. Schonbrun, Berkeley, CA, for Roman Buholzer d/b/a The Continental Garden Restaurant.

John W. Davis, Steven Helfand, San Francisco, CA, for Rent Tech, Inc. and Rental Solutions, Inc.

John J. Pentz, Class Action Fairness Group, Sudbury, MA, for Round House, Inc. d/b/a Smuggler's Cove.

Richard J. Archer, Archer & Hanson, Occidental, CA, Matthew Floum, Brooklyn, NY, for Reyn's Pasta Bella, LLC, Jeffrey Ledon Deweese, M.D., Barry Leonard d/b/a Critter Fritters, and Hat-in-the-Ring, Inc. d/b/a Eddie Rickenbacker's.

Joshua R. Floum, Holme Roberts & Owen, LLP, San Francisco, CA, for Wells Fargo Bank, N.A.

Stanley M. Grossman, Pomerantz Haudek Black Grossman & Gross LLP, New York, Golomb Honik & Langer, Philadelphia, PA, for Nu-City Publications, Inc.

Fred T. Isquith, Wolf Haldenstein Adler Freeman & Herz LLP, New York, for Plaintiff Class and Class Representative, UCC QuickDocs, Inc.

John W. Rasmussen, Johnson Rasmussen Robinson & Allen PLC, Mesa, AZ, for Armenta's Mexican Food, Inc. and Lupita Llamas Martinez d/b/a Del Yaqui Restaurant.

Edward W. Cochran, Shaker Heights, OH, John F. Duane, New York City, for Leonardo's Pizza By the Slice, Inc. and 710 Corp.

William Kenneth C. Dippel, Dippel & Davis, PLC, Dallas, TX, for Preston Center Personal Training, Inc.

R. Stephen Griffis, Birmingham, AL, for Sound Deals, Inc. and Digital Playroom, Inc.

MEMORANDUM AND ORDER

GLEESON, District Judge.

In this antitrust action, a class of approximately five million merchants (the "Class") alleges that, among other things, defendants Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard") have illegally tied their debit products to their credit cards, in violation of the Sherman Act. Just as the trial was about to commence, the parties agreed to settle. Essentially, the defendants promised to untie the two products, and to pay

the Class more than $3 billion, in return for the Class' promise to release defendants from the claims in the case and other claims based on the same conduct. Now, lead counsel for the Class, Constantine & Partners, P.C. ("Lead Counsel"), seek approval of these settlements with Visa and MasterCard and of the proposed plan of allocation for distribution of the damages to the Class members. They seek attorneys' fees for their efforts and the efforts of co-counsel[1] in successfully prosecuting the case, and reimbursement of their expenses.

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[1] In addition to Lead Counsel, there are 29 other firms that represent certain Class members. They are: Hagens Berman LLP (for Bernie's Army-Navy Store); Alexander Hawes & Audet (for Shoes, Etc., d/b/a Arnold's Shoes); Leo W. Desmond (for Denture Specialists, Inc. and Geneva White D.M.D., P.A.); Kenneth A. Elan (for Auto-Lab of Farmington Hills and Shark 3 Audio Inc. d/b/a "Bondy's"); Garwin, Bronzaft, Gerstein & Fisher (for Sportstop, Inc.); Lionel Z. Glancy (for Auto-Lab of Farmington Hills); Goodkind Labaton Rudoff & Sucharow LLP (for Shark 3 Audio Inc. d/b/a/ "Bondy's"); Heins Mills & Olson, P.L.C. (for Shoes, Etc., d/b/a Arnold's Shoes); Hoffman & Edelson, LLC (for Shoes, Etc., d/b/a Arnold's Shoes); Jenkins & Mulligan (for Computer Supplies Unlimited); Jeffrey F. Keller (for Sportstop, Inc.); Kirby McInerney & Squire, LLP (for Bernie's Army-Navy Store); Levin Fishbein Sedran & Berman (for Shoes, Etc., Inc., d/b/a Arnold's Shoes and Scrub Shop, Inc.); Lieff Cabraser Heimann & Bernstein (for Shoes, Etc., Inc., d/b/a Arnold's Shoes and Scrub Shop, Inc.); Lawrence Metzger (for Scrub Shop, Inc.); Milberg Weiss Bershad Hynes & Lerach (for UCC Express, Inc., The Coffee Stop, Inc., d/b/a Torreo Coffee & Tea Company and Payless Shoe Source); Miller, Faucher, Cafferty & Wexler (for Burlington Coat Factory Warehouse, Inc.); Prongay & Borderud (for 53, Inc.); Rabin & Peckel (for Denture Specialists, Inc. and Geneva White D.M.D., P.A.); Rohan Goldfarb & Shapiro, PS (for Bernie's Army-Navy Store); Elwood S. Simon & Associates, P.C. (for Sportstop, Inc.); Harris J. Sklar (for Scrub Shop, Inc.); Spector, Roseman & Kodroff (for The Coffee Stop, Inc., d/b/a Torreo Coffee and Tea); Jerald M. Stein (for Sportstop, Inc.); Robert Taylor-Manning (for Bernie's Army-Navy Store); Trujillo, Rodriguez & Richards (for Shoes, Etc., d/b/a Arnold's Shoes); Wolf Halderstein Adler Freeman & Herz LLP (for UCC Express, Inc.);

(Continued on following page)

I approve the settlements and the plan of allocation. I also award attorneys' fees in the amount of $220,290,160.44, and authorize reimbursement of costs in the amount of $18,716,511.44.

BACKGROUND

The claims in the case, and the factual basis for those claims, are set forth in some detail in my decision on the parties' motions for summary judgment, *In re Visa Check/ Mastermoney Antitrust Litig.*, No. 96-CV-5238, 2003 WL 1712568 (E.D.N.Y. Apr.1, 2003), and my decision certifying the Class, *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y.2000), *aff'd*, 280 F.3d 124 (2d Cir.2001). Familiarity with those decisions is assumed here. The following is a brief summary of the facts and procedural history relevant to the issue before me.

In a complaint filed on October 25, 1996, the named plaintiffs asserted claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They alleged that the defendants' practice of requiring merchants who accepted defendants' credit cards to also accept their debit products (the "Honor All Cards" rule) was an illegal tying arrangement, in violation of section 1. The plaintiffs further alleged that, through these tying arrangements and other anticompetitive conduct, the defendants attempted to monopolize the debit card market, in violation of section 2.

On February 22, 2000, I certified the Class, and the Second Circuit affirmed that order on October 17, 2001.

Zwerling, Schachter & Zwerling, LLP (for 53, Inc.); and Michael Zwick (for Auto-Lab of Farmington Hills).

Following the Second Circuit's decision, the parties supplemented their previously filed motions for summary judgment, and oral argument of those motions was held on January 10, 2003. On April 1, 2003, I granted plaintiffs' motions in part and denied them in part. I denied the defendants' motions. The parties then submitted a comprehensive, joint pretrial order. On April 21, 2003, jury selection began.

On April 28, 2003, the day opening statements were to occur, MasterCard agreed to settle with the Class. Because Visa and the plaintiffs were on the precipice of a settlement as well, opening statements in the trial against Visa were postponed for two days. On April 30, 2003, with a jury in the box awaiting opening statements, Visa and the plaintiffs agreed to settle. Thereafter, the parties entered into memoranda of understanding. These memoranda served as blueprints for the final proposed settlement agreements dated June 5, 2003 ("Settlements" or "Settlement Agreements").[2]

The Settlement Agreements are the proposed culmination of approximately seven years of litigation, and represent the largest antitrust settlement in history. They provide, among other things, for:

> (1) the cessation, as of January 1, 2004, of defendants' "Honor All Cards" rules, by which the defendants' debit card services to merchants

[2] The Class entered into separate agreements with Visa and MasterCard. Because the substance of the Settlements are for the most part virtually identical, I will refer to them collectively. Where they differ from one another, I will refer to them separately as the "Visa Settlement" or the "MasterCard Settlement."

were tied to their credit card services (Settlements ¶ 4);

(2) the creation of a $3.05 billion settlement fund (*id.* ¶ 3(a));

(3) the creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards by January 1, 2007 (80% by July 1, 2005), so merchants and consumers can distinguish these products from credit cards (*id.* ¶¶ 5, 7);[3]

(4) the lowering, by roughly one third, of the interchange rates on debit products for the period from August 1, 2003, through December 31, 2003, (*id.* ¶ 8);

(5) other injunctive relief, such as the provision of signage from defendants to merchants communicating the merchants' acceptance of defendants' untied debit products; and a prohibition on defendants enacting any rules that prohibit merchants from encouraging or steering customers to use forms of payment other than defendants' debit cards, including by discounting other forms of payment (*id.* ¶¶ 6, 9);

(6) the Court's continuing jurisdiction to ensure compliance with the Settlement (*id.* ¶ 41); and

(7) the release of Visa and MasterCard from claims arising out of the conduct at issue in the

[3] Illustrations of these new identifiers on Visa and MasterCard debit cards are attached to this memorandum as appendices on pages 38 through 41. Page 38 depicts both the original Visa debit card design and the new design; page 39 shows another description of the new Visa design. Pages 40 and 41 show the same with respect to MasterCard debit cards.

action prior to January 1, 2004 (Visa Settlement ¶ 28; MasterCard Settlement ¶ 30).

Most of the compensatory relief will take the form of cash payments by Visa totaling $2,025,000,000 and by MasterCard totaling $1,025,000,000, in annual installments over the next 10 years. (Lead Counsel's Fee Pet. at 22 ("Fee Pet.") (citing Settlements ¶ 3).) The relief also includes approximately $846 million – the amount by which the interchange rates for defendants' debit products have been reduced for the period from August 1, 2003 through December 31, 2003. (Fisher Suppl. Dec. ¶¶ 4-6.)[4] The discounted present value of the total compensatory relief, on which Lead Counsel base their requested fee, amounts to $3,383,400,000 (the "Fund"). (Fee Pet. at 3.)

The general terms of the Settlement Agreements were contained in a notice to the Class in July and August 2003.[5] Only 18 merchants, out of approximately five million, filed objections to the Settlements and the plan of allocation.[6] On September 25, 2003, I held a fairness

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[4] Professor Franklin M. Fisher, one of the Class' experts, teaches at the Massachusetts Institute of Technology. (Fisher Dec. Ex. FVD-1.) He is an authority in economics, and has written extensively in this area. He has also given testimony in other antitrust litigations. (*Id.*)

[5] In the notice, the absent Class members were informed of the status of the case and their rights. This notice included a summary of the claims made and the history of the action; the plan and the fee petition (filed on August 18 pursuant to Court order); the releases, verbatim, as set forth in the proposed Settlement Agreements; a description of their rights to object to the Settlements; and instructions on how they could receive more information about the Settlements, including by calling a toll free number, contacting the claims administrator or Lead Counsel, or by visiting the web site established by Court order.

[6] These objectors are: Reyn's Pasta Bella, LLC; Jeffrey Ledon Deweese, M.D.; Barry Leonard d/b/a Critter Fritters; Hat-In-The-Ring,

(Continued on following page)

hearing in our ceremonial courtroom to hear argument of those objections and any others that might be raised.

DISCUSSION

A. *The Settlement*

1. *The Standard for Approving a Proposed Settlement*

Pursuant to Federal Rule of Civil Procedure 23(e), any settlement of a class action requires court approval. In order to approve such a settlement, the court must assure itself that the settlement is "fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani,* 218 F.3d 132, 138 (2d Cir.2000). The decision to grant or deny such approval lies within the discretion of the trial court, *see In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 473 (S.D.N.Y.1998), and that discretion should be exercised in light of the general policy favoring settlement, *see Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). In making this determination, a court must neither rubber stamp the settlement nor engage in "the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974) ("*Grinnell*

Inc. d/b/a Eddie Rickenbacker's; 710 Corp.; Leonardo's Pizza By The Slice, Inc.; Preston Center Personal Training, Inc.; Armenta's Mexican Food, Inc.; Lupita Llamas Martinez d/b/a Del Yaqui Restaurant; Roman Buholzer d/b/a The Continental Garden Restaurant; NuCity Publications, Inc; MSV Records & Productions, Inc.; Southern Lady Flowers; Sound Deals, Inc.; Digital Playroom, Inc.; Southern Network Services, Inc.; Duke Products, Inc.; and Village Fabrics and Furnishings, Inc. There were a total of 17 merchants who objected to Lead Counsel's fee request.

I"), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000).

To evaluate whether or not a class settlement is fair, a district court examines the negotiations that led up to the settlement and the substantive terms of the settlement. *See In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 145 (E.D.N.Y.2000). As to the first issue, "[t]he [negotiation] process must be examined 'in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves.'" *Id.* at 145-46 (quoting *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir.1983)). In this case, there could not be any better evidence of procedural integrity. Experienced and able counsel on all sides fought aggressively (albeit always with professionalism) for many years, and negotiated feverishly (with the same professionalism) to produce the Settlement Agreements at the eleventh hour. Collusion or coercion could not conceivably have tainted the process. (*See* Green Dec. ¶ 12 ("[I]t is my opinion that the [S]ettlement[s] w[ere] achieved through a fair and reasonable process and [are] in the best interest of the class. . . . the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties.").)[7]

As for substantive fairness, the Second Circuit has held that the relevant factors include:

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[7] Eric D. Green served as the mediator during the settlement negotiations from late 2002 untilMay 2003. (Green Dec. I ¶ 3, II ¶ 6.)

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell I, 495 F.2d at 463 (citations omitted).

The potential for this complex litigation to result in enormous expense, and to continue for a long time, was great. The complexity of federal antitrust law is well known, *see, e.g., Weseley v. Spear, Leeds & Kellogg,* 711 F.Supp. 713, 719 (E.D.N.Y.1989) (antitrust class actions "are notoriously complex, protracted, and bitterly fought"), as are the particular difficulties with the law that governs tying arrangements, *see, e.g.,* Herbert Hovenkamp, *Tying Arrangements and Class Actions,* 36 Vand. L.Rev. 213, 213 (1983) ("Few areas of federal antitrust law are more confusing than the law that governs tying arrangements."). This action would have taken three months (at a grueling pace) to try. Past that, it would have taken many more years to finally resolve, taking into account the time necessary to exhaust all avenues of review. Accordingly, this factor weighs heavily in favor of approving the Settlements. *See Slomovics v. All for a Dollar, Inc.,* 906 F.Supp. 146, 149 (E.D.N.Y.1995) (citing *In re Crazy Eddie Sec. Litig.,* 824 F.Supp. 320, 324 (E.D.N.Y.1993)); *see also, e.g., Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358,

362 (S.D.N.Y.2002) (approval granted where "[d]elay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait for years for any recovery, further reducing its value.").

The second factor – the reaction of the class – may be the most significant factor in this inquiry. *See id.* The extremely small number of objectors – a mere 18 out of approximately five million Class members – heavily favors approval. *See* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41, at 108 (4th ed. 2002) ("*Newberg*") ("[A] certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members. If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *see also D'Amato v. Deutsche Bank,* 236 F.3d 78, 86-87 (2d Cir.2001) (holding that "[t]he District Court properly concluded that this small number of objections [18 where 27,883 notices were sent] weighed in favor of the settlement.").

The third factor also favors approval. Settlements were not reached literally until trial was about to commence, after complete and exhaustive discovery,[8] summary judgment proceedings, and substantial mediation.

The risks of establishing liability and damages at trial, and of maintaining the Class throughout the trial (the fourth, fifth, and sixth factors, respectively) also

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[8] These efforts included a review of approximately five million pages of documents, almost 400 depositions, discovery from roughly 200 non parties, 54 expert reports, and 21 expert depositions. (*See* Final Appr. at 26 (citing Constantine Dec. ¶¶ 7, 14-19, 23-26).)

militate in favor of approval. Crucial to the plaintiffs' claims was their ability to prove that the tying arrangements had anticompetitive effects. In light of the procompetitive features of the "Honor All Cards" rule, this was no sure thing. Even if liability had been established, the Class would still have faced the problems and complexities inherent in proving damages to the jury. The plaintiffs' theory of damages would have been hotly contested at trial. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y.1998) ("[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal."). Even if they succeeded on that level, they would have faced the practical problem of asking jurors – who felt they had already absorbed the cost of high interchange rates through higher prices at the merchants' checkout counters – to absorb them once again through the higher bank fees that would result from a hefty damage award. Finally, it is possible that the Class could have been decertified or modified as the litigation continued. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 89 (E.D.N.Y.2000) ("If factual or legal underpinnings of the plaintiffs' successful class certification motion are undermined once they are tested under a more stringent standard . . . a modification of the order, or perhaps decertification, might then be appropriate.").

The seventh factor, the ability of the defendants to withstand a greater judgment, also supports approval of the Settlement Agreements. The compensatory relief by itself constitutes "the largest settlement ever approved by

a federal court." (Coffee Dec. ¶ 12.)[9] The injunctive relief will result in future savings to the Class valued from approximately $25 to $87 billion or more. (Fisher Suppl. Dec. ¶¶ 7-8.) I find that the defendants would not likely be able to withstand a significantly greater damage award.

Finally, I find that the Settlement Agreements are within the range of reasonableness in light of the best possible recovery and in light of all the attendant risks of litigation.

2. *The Objections*

As noted, there were several objections to the Settlements. I discuss the more substantive ones below.

a. *The Scope of the Releases*

Two objections concern the scope of the releases. The "Pasta Bella objectors"[10] and NuCity Publications, Inc. ("NuCity") have filed objections on the ground that the releases improperly seek to bar their respective lawsuits in other courts. In response, Visa and MasterCard argue

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[9] Professor John C. Coffee, Jr., an expert retained by the Class, teaches at Columbia University Law School. (Coffee Dec. at II ¶ 6.) He is an authority on class action litigation, particularly the management of large class actions and attorneys' fees. (*Id.* ¶ 7.) In this regard, he has (1) testified before congressional committees; (2) published extensively on the subject (some of which publications have been relied upon by other federal courts); (3) testified in a number of class actions; and (4) served as an expert witness in many recent, significant class actions. (*Id.* ¶¶ 8-9, 11.)

[10] The "Pasta Bella objectors" are Reyn's Pasta Bella, LLC, Jeffrey Ledon DeWeese, M.D., Barry Leonard d/b/a Critter Fritters, and Hat-In-The Ring, Inc. d/b/a Eddie Rickenbacker's.

that there is sufficient overlap between the facts underlying the claims asserted here and the facts underlying those other actions to justify the release of the objectors' claims.[11] I conclude that claims asserted elsewhere by the Pasta Bella objectors and NuCity can be – and are in fact – extinguished by the releases.

The disputed releases provide, in pertinent part:

> [T]he Released Parties shall be released and forever discharged from all manner of claims . . . against the Released Parties . . . that any Releasing Party ever had, now has or hereafter can, shall or may have, relating in any way to any conduct prior to January 1, 2004 concerning any claims alleged in the Complaint or any of the complaints consolidated therein, including, without limitation, *claims which have been asserted or could have been asserted in this litigation which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, or other law or regulation, or common law, including, without limitation, the Sherman Act,* 15 U.S.C. § 1 *et seq.*

(Visa Settlement ¶ 28 (emphasis added); MasterCard Settlement ¶ 30 (emphasis added).) The "Released Parties" are defined as "Visa, Visa International Service Association, and their . . . member financial institutions" (Visa

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[11] Lead Counsel agree with Visa and MasterCard that the releases are proper but take no position on whether or not the actions filed in the two cases are barred. (Final Appr. at 36; *id.* at 46-47 ("Because . . . the releases are proper . . . and within Lead Counsel's authority to grant under the law, it is irrelevant whether or not the claims set forth in *Pasta Bella* or *NuCity* are extinguished or limited.").)

Settlement ¶ t) and "MasterCard and any . . . member financial institutions" (MasterCard Settlement ¶ v).

At the fairness hearing, Lead Counsel acknowledged that the releases cover the specified types of claims that were asserted or could have been asserted in this case, but only if the unasserted claims depend on the same factual predicate that underlie the claims that were brought in the instant case. (*See* Sept. 25, 2003 Hr'g Tr. at 95 ("Fairness Hr'g").) A release of such breadth is unobjectionable. *See TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982) ("[A] court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action"); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 n. 7 (2d Cir.1981) ("[A] settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts."); *Newberg* § 12:15, at 312 ("The scope of a judgment must be limited to the claims that were asserted or that may arise out of the transactions or events pleaded in the complaint. . . . A settlement may properly prevent class members from subsequently asserting claims relying upon a legal theory different from that relied upon in the class action complaint, but depending upon the same set of facts."). Thus, the only remaining question is whether the claims in the objectors' actions arise from the same set of facts as in the instant action.

In its putative class action in the Northern District of California, the Pasta Bella objectors allege, *inter alia*, that the setting of credit and debit card interchange fees by Visa and MasterCard on behalf of their member banks

(including Bank of America, N.A., Wells Fargo Bank, N.A., and U.S. Bank, N.A.) constitutes price-fixing in violation of the Sherman Act. *Reyn's Pasta Bella, LLC v. Visa U.S.A.*, 259 F.Supp.2d 992, 997 (N.D.Cal.2003) ("*Reyn's*"). The plaintiffs in the case purport to represent a class of

> all persons and business entities in the United States who are retailers, businesses, professions and merchants, including those "on-line," and presently have VISA and/or MASTERCARD merchant contracts with one or more member banks pursuant to which they have "sold" (deposited) VISA and MASTERCARD charge or debit receipts, or electronic equivalents, to one or more member banks for deposit in their commercial demand deposit bank account and have thereby incurred deposit fees.

(Pasta Bella's Sec. Am. Compl. ¶ 11.)

Reyn's is a virtual clone of the centerpiece of this case. In *Reyn's*, the plaintiffs challenge an agreement among Visa's and MasterCard's member banks to impose a uniform intercharge fee as a horizontal restraint of trade, in violation of section 1 of the Sherman Act. *Reyn's*, 259 F.Supp.2d at 998. The essence of that claim is that the intercharge fees are artificially (and anticompetitively) high because of concerted activity by Visa and MasterCard in violation of section 1. Here, the identical result is alleged to have resulted from concerted activity that is closely related to that alleged in *Reyn's* – the "Honor All Cards" rule that both defendants used to tie their debit products to their credit cards. In addition, both cases require proof of the anticompetitive effects of the elevated intercharge rates under a "rule of reason" analysis.

While the overlap in the factual predicates for the section 1 claims in each case would alone permit the release of the claims in *Reyn's*, the section 2 claims in the instant case truly end the inquiry. The Class here has repeatedly alleged, and was prepared to prove at trial, that the offending interchange rates were fixed by Visa and MasterCard. (*See, e.g.*, 2d Am. Compl. ¶ 45 ("The trend towards uniformity in pricing among dual Visa/MasterCard members has also been facilitated and exacerbated because Visa bank members collectively fix the Visa interchange fees and contemporaneously, acting as MasterCard members, collectively fix the MasterCard interchange fees. These price fixed interchange fees are the bulk of the final 'discount fees' charged to retailers who accept Visa and MasterCard plastic cards."); Defs. Mem. Supp. Mot. Summ. J. at 59-60 (asserting that plaintiffs cannot make out their claim concerning inflated credit card interchange rates); Pls. Mem. Law. Opp. Defs. Mot. Summ. J. at 47-49 (asserting that there is evidence to show that defendants artificially inflated credit card interchange rates).)

Furthermore, every member of the putative class in *Reyn's* is a member of the Class in this case. The same is true of the plaintiffs in the NuCity action.[12] As such, there

[12] The Class includes merchants who accepted Visa and/or MasterCard credit cards for payment at any time during the period from October 25, 1992 to June 21, 2003. (*See* Settlement Notice ¶ 20.) The putative class in *Reyn's* includes merchants who had contracts with defendants' member banks to deposit their credit or debit receipts as of June 24, 2002. (Pasta Bella's 2d Am. Compl. ¶ 11; Pasta Bella Obj. at 8.) NuCity purports to represent two classes of merchants: (1) those who accepted Visa credit card transactions for the period from June 28, 1996 through October 9, 2001; and (2) those who accepted MasterCard credit

(Continued on following page)

is no specter here, as there was in *National Super Spuds,* of settling plaintiffs giving away claims possessed only by absent class members in exchange for the settlement. *See TBK Partners, Ltd. v. W. Union Corp.,* 675 F.2d 456, 462 (2d Cir.1982) (distinguishing *National Super Spuds* on ground that "[a]t the heart of our concern [in *National Super Spuds*] was the danger that a class representative not sharing common interests with other class members" would sacrifice the interests of those other class members).

In *National Super Spuds,* the class consisted of persons who had liquidated long positions in potato futures contracts and sought damages on that basis. A subset of the class also held unliquidated contracts. 660 F.2d at 11, 16. The proposed settlement, however, released claims based on both liquidated and unliquidated contracts. *Id.* at 14. The Second Circuit reversed the district court's approval of settlement. It stated that the settlement was inequitable where "a class member holding one liquidated and one unliquidated contract receives no more than another class member holding only one liquidated contract." *Id.* at 19. The court further reasoned that "[t]here is no justification for requiring . . . [the] release [of] claims based on unliquidated contracts as part of a settlement in which payments to class members are to be determined solely on the basis of the contracts they liquidated." *Id.* at 18.

Such circumstances are not present here. Rather, in exchange for an unprecedented amount of compensatory damages, plaintiffs here have released all claims based on

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card transactions for the period from June 28, 1996 through October 9, 2001. (NuCity's 2d Am. Compl. ¶ 27.)

the mix of facts that produced anticompetitive intercharge rates.

Finally, the Pasta Bella objectors correctly point out that the defendant banks in *Reyn's* are not parties to this case. However, that does not preclude the inclusion of the claims against those banks in the releases. *See In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002) ("[C]ourts recognize that it is appropriate for a class action settlement to include a limited release of a non-party . . . where that non-party has contributed substantially to making the settlement possible"); *see also In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 149 (E.D.N.Y.2000); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 181 (E.D.Pa.1997). The defendants' member banks have not only contributed to the Settlements, but virtually all of the relief comes from them. (*See* Pls. Mem. Law Supp. Mot. Final Approval Settlements at 50 ("Final Appr.").)[13] The releases therefore cover the defendant banks in *Reyn's*.

The claims NuCity has advanced in *In re Visa/MasterCard Membership Rule Antitrust Litig.*, No. 01-CV-10027 (filed in the Southern District of New York) (the "NuCity action") are properly released as well. That putative class action alleges that Visa and MasterCard violated section 1 of the Sherman Act through their

[13] For example, they have already lowered their debit interchange rates as a result of the interim interchange reductions and have begun to send notice of the January 1, 2004 end-of-tying arrangement date. In addition, they will physically and electronically reconfigure more than 200 million debit cards and may also contribute to the compensatory relief via association fees. (Final Appr. at 50.)

exclusionary membership rules, that is, their prohibition of their member banks from issuing or providing services to other credit cards (such as Discover or American Express). The effect of these rules, they allege, is inflated prices for credit card transactions. (NuCity's 2d Am. Com pl. ¶¶ 29-31, 37.)

The exclusionary rules at the heart of the NuCity action are an integral part of the factual predicate of this case. From the beginning, the plaintiffs in this case have contended that defendants' "Honor All Cards" tying rules were supported, reinforced, and exacerbated by specific additional anticompetitive conduct, including exclusionary behavior. As part of their section 1 tying claim, plaintiffs argued that defendants' exclusionary rules created barriers to entry in the market for credit card services, thus solidifying defendants' power in that market and their ability to force merchants to accept their debit cards.

The exclusionary rules have been central to this case from its inception. In their complaint, plaintiffs alleged that

> Visa members collectively adopted a rule barring their members from issuing any plastic cards competitive with Visa cards. This rule exempted MasterCard, permitting Visa's dual members to continue issuing MasterCard plastic cards. Visa members then turned around and, acting as MasterCard members, adopted the same non-competition rule. The effect of these rules was to deprive existing and new competitors of a marketing outlet at the 6,000 largest and most appropriate vendors of their products, *i.e.*, the dual bank members of Visa and MasterCard.

(2d Am. Compl. ¶ 50); *see also id.* ¶¶ 52-54 (alleging that defendants asked their members to boycott American Express and Discover cards).) Plaintiffs made clear in opposing summary judgment that they would seek to carry their burden of proving predatory conduct in violation of section 2 by, *inter alia,* establishing the existence of these practices and by demonstrating that they exacerbated the anticompetitive effects of the defendants' tying arrangements. (*See* Pls. Reply Mem. Law Supp. Pls. Mot. Summ. J. at 3 n. 5 ("[P]laintiffs have consistently argued that . . . the related anticompetitive conduct [*e.g.,* defendants' exclusionary rules] has reinforced and exacerbated the effects of the tie."); Pls. Mem. Law Supp. Pls. Mot. Summ. J. at 6-7, 52, 60; Pls. Reply Mem. Law Supp. Pls. Mot. Summ. J. at 23 n. 53; Suppl. Mem. Law Supp. Pls. Mot. Summ. J. Opp. Defs. Mot. Summ. J. at 13-14).) At the oral argument of the summary judgment motions on January 10, 2003, Lead Counsel expressly relied on the exclusionary rules as central to plaintiffs' claim that the defendants used those rules to "pummel[]" potential competitors in the debit services market. (Summ. J. Hr'g Tr. at 58-59.)

I have previously found the exclusionary rules of which NuCity complains to be a common issue in this case and among the claims in *United States v. Visa U.S.A., Inc.,* 163 F.Supp.2d 322 (S.D.N.Y.2001), *modified by* 183 F.Supp.2d 613 (S.D.N.Y.2001), *aff'd,* 344 F.3d 229 (2d Cir.2003), the government case on which NuCity piggybacks. Based on that finding, I granted the government's motion to intervene in this action to allow Lead Counsel to share with the government their substantial analysis of the documents and depositions in this action. *In re Visa Check/MasterMoney Antitrust Litig.,* 190 F.R.D. 309, 312 (E.D.N.Y.2000).

I conclude, in light of the principles of *Super Spuds* and its progeny, that NuCity's claims may properly be barred by the releases.

Last, NuCity argues that the notice to the Class of the proposed Settlements was improper because it did not inform the Class of the pending NuCity action and of the fact that the releases would extinguish it. They also complain that the notice did not report what consideration was given in exchange for the release of those claims. (NuCity Obj. at 8-13.)

These arguments are unpersuasive. The notice of the scope of the releases was adequate. Indeed, it recited the releases, word for word. (*See* Settlement Notice ¶ 18.) Thus, the expansive reach of the releases could not have been clearer. This is all that was required. *See Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir.1982) (notice "must fairly apprise the prospective members of the class of the terms of the proposed settlement") (quotation marks omitted); *Newberg* § 11:53, at 167 (notice is only "adequate if it may be understood by the average class member"). There is no requirement that the Class be specifically apprised of all pending actions covered by the releases, as long as the releases themselves were sufficiently clear.

b. *The Absence of Notice in Spanish*

Armenta's Mexican Food, Inc. ("Armenta's"), and Lupita Llamas Martinez d/b/a Del Yaqui Restaurant ("Llamas") contend that the Settlement Agreements should not be approved because the notices to the Class (transmitted by mail, publication, a website, and a toll-free

telephone number) were provided only in English, and not in Spanish as well.[14] They maintain that this English-only notice did not comport with due process or Rule 23(e)[15] because "[t]he cost to include notice in Spanish in these print notices, and a link on websites and Spanish option at the telephone sites would have been negligible." (Armenta's and Llamas Obj. at 2-3.) The website argument is well-taken. It would have been a useful addition to the notice to have included a bulletin (in Spanish) that a Spanish translation of the notice was available on a specified website. However, the absence of notice in Spanish does not warrant the denial of approval of the Settlement Agreements.

To support their contention, Armenta's and Llamas rely on several statistics. For example, they report that in 2000 more than 2.4 million New Yorkers over five years old spoke Spanish at home (*id.* at 4), and that as of 1997, Latino- and Hispanic-owned businesses comprised some 1.2 million of the nation's 20.8 million businesses (*id.* at 4-5). But these objectors have failed to demonstrate that there is a sizeable group of merchants in the Class who could not comprehend the notice. When questioned about this deficiency at the fairness hearing, counsel acknowledged the lack of fit between the statistics cited and the

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[14] Armenta's and Llamas do not argue that Spanish-speaking merchants failed to receive notice at all; rather, the claim is that they did not receive notice in Spanish. (Fairness Hr'g at 45.)

[15] The current Rule 23(e), which became effective on December 1, 2003, provides, in relevant part: "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed.R.Civ.P. 23(e)(B).

proposition advanced.[16] Counsel nevertheless argued that Spanish-speaking merchants in general are "less comfortable with English than they are with Spanish." (Fairness Hr'g at 46.) I assume that is true, but a lack of comfort does not mean there was a significant defect in the notice. In any event, it does not rise to the level of a due process violation. The basic standard is one of reasonableness. *See Soberal-Perez v. Heckler,* 717 F.2d 36, 43 (2d Cir.1983) (" 'The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.' " (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950))).

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[16] THE COURT: What was missing from your objection, and if I missed it I apologize. You had some interesting data about the number of Latino and Hispanic merchants. But I couldn't tell what percentage of them were unable to deal with an English language notice. I assume it is not all of them.

MR. RASMUSSEN: No, Your Honor. What we provided was the most recent census data we could find which was 1997.... The question is asked, as demographers phrase them, which language are you most comfortable with in speaking and reading. In that sense, as data, the evidence appears to be that approximately one half of the 30 some million U.S. households with Hispanic or Latino, and report themselves to be so, with approximately one half of them Spanish would be spoken in the home. Spanish in the newspapers and televisions would be preferred. They would indicate that they are not comfortable. They are less comfortable with English than they are with Spanish. To extrapolate from that is all we can do.

THE COURT: Is that the right universe?

MR. RASMUSSEN: No, of course not.

(Fairness Hr'g at 45-46.)

There has been no showing here that the notice to the Class did not meet that standard.

c. *Section 10 of the Visa Settlement*

Leonardo's Pizza By the Slice and 710 Corp. (collectively "Leonardo's Pizza") challenge paragraph 10 of the Visa Settlement, which essentially provides that Visa cannot enter into new, exclusive debit arrangements with member/owner financial institutions for a period of two years from the date of the Visa Settlement.[17] These objectors argue that this provision is objectionable for two reasons: (1) it fails to invalidate currently existing exclusive deals that prohibit such institutions from issuing a point-of-sale debit card for competing regional networks; and (2) the prohibition lasts for only two years, after which time Visa will once again be able to preclude competition from other non-MasterCard debit card networks. (Leonardo's Pizza Obj. at 4-5; Fairness Hr'g at 59 ("For example . . . if they have a current agreement with a member bank that is more than two years, clearly the paragraph means absolutely nothing. If the agreements are annual

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[17] The full text of paragraph 10 is as follows:

> For a period of two years from the date of the Settlement Agreement, Visa . . . will not enter into a contract with a member financial institution that prohibits the financial institution from issuing an ATM and/or POS debit card of any competing ATM and/or POS network, other than one operating under a trademark owned by MasterCard. This provision does not affect the validity of existing agreements entered into prior to the date of this Settlement Agreement. Apart from this provision, nothing herein shall prohibit Visa from competing with any other payment card brand for the card issuing business of Visa member financial institutions.

(Visa Settlement ¶ 10.)

agreements, then the restriction limiting Visa's activity to two years means almost nothing.").) These objectors also complain that the MasterCard Settlement does not contain a similar provision. (Leonardo's Pizza Obj. at 5.) For their part, Lead Counsel assert that this provision will help "jump start [] competition in the debit market," and that the MasterCard Settlement does not include this "no exclusivity" provision because MasterCard, unlike Visa, never adopted a campaign to remove regional network marks from their member banks' debit cards. (Final Appr. at 78-79.)

The Class has the better of this argument. The "no exclusivity" provision is the result of hard-fought negotiations conducted against a fully developed factual background. It addresses an issue that would have been disputed at trial: whether Visa sought to stifle competition from the regional networks by having their logos removed from the backs of Visa debit cards. That the relief obtained in the Visa Settlement is limited in duration, or to postsettlement contracts, is of no concern. Indeed, such compromises are the essence of a settlement:

> Contrary to the objectors' expectations, the settlement is not a wish-list of class members that the Defendant[] must fulfill. These . . . objectors fail to understand that the form and amounts of benefit provided were arrived at as a result of hard-fought negotiations between experienced class action attorneys. Plaintiffs' counsel, having weighed the risks of proving liability and damages at trial, negotiated . . . benefits in an amount and form that, in their judgment, would compensate plaintiffs. . . .

Thompson v. Metro. Life Ins. Co., 216 F.R.D. 55, 65 (S.D.N.Y.2003) (quotation marks omitted).

* * *

For all of the foregoing reasons, I approve the Settlement Agreements.[18]

B. *The Allocation Plan*

"As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable" under the particular circumstances of the case. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y.1997), *aff'd*, 117 F.3d 721 (2d Cir.1997). "An

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[18] The remaining objections to the Settlements are without any merit. Leonardo's Pizza requested that Class members be given a second opportunity to opt out of the Class now that the Settlements' terms are known. (Leonardo's Pizza Obj. at 6.) Because I have approved these Settlements as fair, however, due process does not afford Class members a second opportunity to opt out. *See Officers for Justice v. Civil Serv. Com'n*, 688 F.2d 615, 635 (9th Cir.1982); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002). I note that the revisions to Rule 23, which took effect December 1, 2003, permit judges, in their discretion, to direct a second opt-out opportunity. *See* Fed.R.Civ.P. 23(e)(3) ("[T]he court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."). I decline to exercise this option, in light of the infinitesimal number of objections by merchants.

Leonardo's Pizza also asserts that Class Counsel should publish on the Internet: (a) their system for distributing any money remaining in the common fund after distributions to absent Class members; and (b) that any motion for securitization of the award be published on the case website. (Leonardo's Pizza at 6-7.) There is no controversy on this issue, as Lead Counsel have stated in their papers that they will do so. (Final Appr. at 81-82.)

allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re Am. Bank Note Holographics, Inc.*, 127 F.Supp.2d 418, 429-30 (S.D.N.Y.2001) (quotation marks omitted). Whether the allocation plan is equitable is "squarely within the discretion of the district court." *In re PaineWebber*, 171 F.R.D. at 132. I find that the plan is both fair and reasonable, and thus I approve it.

The plan works as follows. Class members will receive an award of money from the Net Settlement Funds[19] directly proportional to their ~~debit and credit~~ purchase volume (as well as online debit transactions) during the Class period, which is the period of time from October 25, 1992 to June 21, 2003. (Allocation Plan at ii-iii) ("Plan").[20] To do this, Class members need to provide only a minimal amount of information, and in some cases none at all. Specifically, Class members in the Visa Transaction Database – which includes records for a majority of the

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[19] The plan defines "Net Settlement Funds" as "Visa and MasterCard Gross Settlement Funds, less the amount of the Fee Award and Court-approved expenses, taxes, and costs of notice and administration." (Allocation Plan ¶ N.)

[20] To determine what each Class members' proportional share is, the plan uses a methodology that approximates the amount each Class member was damaged for each dollar of Visa and/or MasterCard debit or credit transactions (as well as for each online debit transaction) accepted during the Class period. The claims administrator will utilize this methodology to compute individual Class member damages and claims by using debit and credit volumes from Visa and MasterCard's databases. Visa's database includes Visa debit and credit transaction counts and dollar volumes broken out by month for each Class member that accepted Visa transactions at any time between October 1, 1996 and July 31, 2003. (Plan ¶ 2.2.) MasterCard's database provides the same information for Class members that accepted MasterCard transactions from June 1, 2001 through June 30, 2003. (*Id.* ¶ 2.3.)

Class – do not need to provide any information in order to claim the portion of the Net Settlement Funds that corresponds with Visa and/or MasterCard debit and credit damages for the Class period between October 1, 1996 and June 21, 2003.[21] For the Class period prior to October 1996, Class members must produce a merchant contract, processor statement, or other information that demonstrates when they accepted Visa and/or MasterCard during that time period. The only transactional data that a Class member must supply are its processor statements showing the number and/or dollar volume of online debit transactions accepted during the Class period. (*Id.* ¶¶ 4-6.) This system relieves the Class of an enormous (and perhaps insurmountable) burden because, as Lead Counsel have represented, the merchants cannot reasonably produce the necessary records of transactions. (Final Appr. at 65.)

Notably, only two absent Class members object to the Plan: Roman Buholzer d/b/a The Continental Garden Restaurant ("Buholzer"), and Preston Center Personal Training, Inc. ("Preston Center"). The first objection concerns the proposed securitization of the Net Settlement Funds. The argument is that if Lead Counsel fail to obtain securitization for those monies, then Class Counsel will unfairly receive their fees first, to the detriment of the Class members, who will be forced to await payment of

[21] As Lead Counsel have represented, given the time frame for which there is Visa transaction data and the fact that "virtually all merchants who accept Visa's payment transactions also accept MasterCard's, [Visa's] database covers the vast majority of the Class." (Final Appr. at 66-67.)

fees before receiving any relief.[22] I have every reason to believe that once the Settlements are finally approved (*i.e.*, after the resolution of any appeals), Lead Counsel will be able to obtain the securitization for the benefit of the Class. Even if it were clear now that they could not do so, I would still approve the payment of attorneys' fees first. The harm to the Class in waiting for compensatory relief would be *de minimis*. Despite the size of the Net Settlement Funds, the far more significant relief for the individual merchants is the injunctive relief – the absence of artificially high and mandatory debit card transaction fees. Indeed, the Class has already received more than $300 million in compensatory damages as a result of Visa's and MasterCard's lowering of their debit card rates since August 1, 2003, which will continue until December 31, 2003. (Fairness Hr'g at 19.) In short, the proposed securitization of the Net Settlement Funds is no reason not to approve the settlements.

The other objection concerns Lead Counsel's purported unfettered discretion in accepting or rejecting late claims for relief by Class members. (Buholzer Obj. at 24 n. 12.) Because Buholzer has failed to offer any basis for its assertion that Lead Counsel may improperly exercise their discretion over the Net Settlement Funds, and because the claims administrator must report all late claims to the Court, which can then accept or overrule Lead Counsel's

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[22] There was also an objection to the plan based on the perceived risk in securitization itself. (*See* Preston Center Obj. at 5 (counsel's "plan to 'securitize' the Visa and MasterCard payments places the settlement fund at risk").) This argument is unpersuasive; the point of securitization is to make the Net Settlement Funds *more* secure. Moreover, Lead Counsel must obtain prior approval of the Court before consummating any such transaction. (*See* Plan ¶ 11.17.)

disposition (*see* Plan ¶ 10), I find this objection to be unpersuasive.[23]

For all of these reasons, I am satisfied that the allocation plan is both fair and reasonable.

C. *Attorneys' Fees*

The Second Circuit has held that the "lodestar" method of computation (*i.e.*, hours reasonably expended multiplied by a reasonable hourly rate, plus an enhancement, if appropriate) and the "percentage of the fund" method are both available to district judges in calculating attorneys' fees in common fund cases. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir.2000). The trend in the Second Circuit is toward the percentage method, *Sheppard v. Consol. Edison Co. of N.Y.*, No. 94-CV-0403, 2002 WL 2003206, at *7 (E.D.N.Y. Aug.1, 2002), which spares the court and the parties the "cumbersome, enervating, and often surrealistic process" of lodestar computation, *Goldberger*, 209 F.3d at 50 (quotation marks omitted). Even when the percentage method is used,

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[23] Buholzer also argues that unlike large Class members, millions of small merchants will be unable to "submit appropriate information to the Claims Administrator." (Buholzer Obj. at 24.) However, as explained above, the only Class members that must supply any information are those who accepted Visa transactions prior to October 1996, and even then they need only present minimal information. Buholzer has ignored how the plan minimizes the data requirements imposed on the merchants.

Buholzer further contends that the plan should not require the administrator to submit its reports on Class members' approved claims under seal. (Buholzer Obj. at 27-28.) I disagree. This procedure is necessary to protect merchants from the release of their relative volume of credit card and debit card transactions, which may be sensitive information in a competitive marketplace.

however, the Second Circuit "encourage[s] the practice of requiring documentation of hours as a 'cross-check' on the reasonableness of the requested percentage." *Id.* at 50. Courts in this circuit commonly adhere to this practice.[24]

No matter which method of calculation is employed, the key consideration in awarding fees is what is reasonable under the circumstances. *See id.* at 47. The traditional criteria in determining a reasonable common fund fee include: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50 (quotation marks omitted).

The Second Circuit has cautioned district courts, in applying these criteria, not to blindly follow a one-size-fits-all "benchmark" in determining the appropriate fee. Such a practice "could easily lead to routine windfalls where the recovered fund runs into the multi-millions." *Id.* at 52; *see also, e.g., In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y.1998) ("In many instances the increase [in the fund] is merely a factor of the size of

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[24] *See, e.g., In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689, 2003 WL 22244676, at *6 (S.D.N.Y. Sept.29, 2003); *In re Sterling Foster & Co., Inc. Sec. Litig.*, 238 F.Supp.2d 480, 489 (E.D.N.Y.2002); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *27 (Nov. 26, 2002); *Baffa v. Donaldson Lufkin & Jenrette Sec. Corp.*, 96 Civ. 0538, 2002 WL 1315603, at *2 (S.D.N.Y. June 17, 2002); *In re Twinlab Corp. Sec. Litig.*, 187 F.Supp.2d 80, 87 (E.D.N.Y.2002); *In re Arakis Energy Corp. Sec. Litig.*, No. 95 CV 3431, 2001 WL 1590512, at *15 (E.D.N.Y. Oct.31, 2001); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 CV 4318, 2001 WL 709262, at *6-7 (S.D.N.Y. June 22, 2001); *In re Fine Host Corp. Sec. Litig.*, No. MDL 1241, 3:97-CV-2619, 2000 WL 33116538, at *5-6 (D.Conn. Nov.8, 2000).

the class and has no direct relationship to the efforts of counsel."). Thus, in megafund cases particularly, courts have "traditionally accounted for these economies of scale by awarding fees in the lower range[s]." *Goldberger,* 209 F.3d at 52; *see also id.* (noting that in cases with recoveries of between $50 and $75 million, courts typically award fees in the range of 11% to 19%); *In re Indep. Energy Holdings PLC,* No. 00 Civ. 6689, 2003 WL 22244676, at *6 (S.D.N.Y. Sept.29, 2003) ("[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent."); *In re NASDAQ,* 187 F.R.D. at 486 (explaining that "absent unusual circumstances, the percentage will decrease as the size of the fund increases" and thus "[i]n cases where a class recovers more than $75-$200 million. . . . fees in the range of 6-10 percent and even lower are common.") (quotation marks omitted).

In determining a reasonable fee, it is also my responsibility to act as a "fiduciary . . . a guardian of the rights of absent class members." *City of Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1099 (2d Cir.1977) ("*Grinnell II*"), *abrogated on other grounds by Goldberger,* 209 F.3d 43 (quotation marks omitted); *see also Goldberger,* 209 F.3d at 52 ("The point is that plaintiffs in common fund cases typically are not fully informed. Nor are they able to negotiate collectively, or at arm's length. This is why we emphasized . . . that awards in these cases are proper only if made with *moderation.*") (quotation marks omitted). Accordingly, I must assess the requested fee award with "a jealous

regard to the rights of those who are interested in the fund." *Id.* at 53 (quotation marks omitted).

Lead Counsel, on behalf of all Class Counsel, request a fee of $609,012,000. (Fee Pet. at 3.) They assert that this amount is 18% of the Fund (the discounted, present value of the total compensatory relief), 2.14% of the present value of the total relief (which includes a conservative estimation of the injunctive relief),[25] and 9.68% times the lodestar figure of $62,940,045.84.[26] A small group of absent Class members have objected to these figures.[27] Some recommended multipliers ranging from 2 to 4; some have urged me to award a percentage of the Fund, ranging from 5% to 10%.[28]

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[25] One of Lead Counsel's experts estimated that the present value of the injunctive relief over the next 10 years would range between $25 and $87 billion, but that the "most plausible" value of the injunction was $70 billion. (Fee Pet. at 3 n. 3 (citing Fisher Dec. ¶¶ 7b, 43).) In its fee petition, Lead Counsel uses the "most conservative estimate" of about $25 billion. (*Id.* at 3.)

[26] These multiplier and lodestar figures were revised from an original multiplier of 9.74 based on a total lodestar of $62,545,603. (*See* Fee Pet. at 64.) Subsequent to Lead Counsel's submission of their fee petition, they advised me that there had been errors made with respect to the lodestar figure that necessitated those slight revisions. (*See* Sept. 8, 2003 Ltr.)

[27] As noted earlier, 17 merchants filed objections to the fee request. They are: Round House, Inc. d/b/a Smuggler's Cove; Ron Fred, Inc. d/b/a Bailey's; Ron Jen., Inc. d/b/a The Boathouse; Preston Center Personal Training, Inc.; Roman Buholzer d/b/a The Continental Garden Restaurant; Rent Tech, Inc.; Rental Solutions, Inc.; Thomas McMackin (as President of Wagner's Bakery, Inc.); Beaches N Cream; Kickers Corner of the Americas, Inc.; Leonardo's Pizza by the Slice; 710 Corp.; Sounds Deals, Inc.; Digital Playroom, Inc.; Southern Network Services, Inc.; Duke Products, Inc.; and Village Fabrics and Furnishings, Inc.

[28] The only other substantive objection to the fee request concerns the appointment of a guardian, fee expert, and special master to

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The requested fee is excessive. Indeed, after considering it against the backdrop of my obligation to fashion a fee award with a "jealous regard" for the financial interests of the five million merchants on whose backs the Settlements were achieved, I conclude that Lead Counsel's request to be paid almost 10 times their hourly rate is absurd.[29] The $609 million request is not a useful starting

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represent the Class' interests in connection with the award of attorneys' fees. (Buholzer Obj. at 2.) The thrust of this complaint is that at this stage in the litigation, there is a conflict of interest between Lead Counsel and the Class, since both groups seek money from the same Fund. There is no need for appointment of a guardian or fee expert for the Class. I regard the functions such experts might perform to be part of my role. An independent auditor is another matter, and if Constantine & Partners had not retained one to audit the hours billed and the resulting fees, I might have had to appoint one to ensure fairness to the Class. As there has already been an independent audit, and there being no basis for me to doubt its validity, no such appointment is necessary. For the same reason, I reject the unfounded assertion that the attorneys' hours are inflated.

[29] Lead Counsel argue that their multiplier of 9.68 is supported by the relevant case law. I disagree. For example, they point to *In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003), where the court awarded an 8.46 multiplier. That case presented unique circumstances, however, that are not present here. In an oral opinion, the court explained that it was allowing such a high hourly rate

> because the case ha[d] settled before a substantial amount of additional work ha[d] been done which would have to be done if the case went forward to complete discovery [and] . . . [d]uring all of that period the number of hours spent would have significantly increased. So the Lodestar would have gone up and the multiplier would have gone down.

Id. at 42-43. In another case, *Cosgrove v. Sullivan*, 759 F.Supp. 166 (S.D.N.Y.1991), the court's award yielded an 8.74 multiplier, but that case is also distinguishable based on unique circumstances. It concerned a public interest law firm battling the Department of Health and Human Services on behalf of a class of Medicare recipients (and doctors

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point; it is not a figure from which reductions can be made based on nuanced disagreements with counsels' methodology or arguments. It is fundamentally unreasonable, and wholly out of character for a group of counsel whose commitment to the corner store merchants they represent has, until now, been admirable and unflagging. I therefore reject it entirely.

I hasten to add that an application of the six *Goldberger* factors indeed compels the award of an extraordinary fee. The first factor is the time and labor expended by counsel. Class Counsel have litigated this case – which did not culminate in settlement until the eve of trial – for seven years. During that time, there were almost 400 depositions of witnesses, including 21 experts who issued 54 expert reports; four rounds of class certification briefing (through the Supreme Court); 16 summary judgment motions, 31 motions *in limine,* and three *Daubert* motions; and a pretrial order identifying 230,000 pages of trial exhibits, 730 trial witnesses, and more than 17,000 deposition designations. (Fee Pet. at 30-31.)

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treating such recipients who had taken an assignment of benefits). The court held as follows:

> When a small law firm successfully battles a huge bureaucracy to obtain justice for a class, with a result that confers enormous benefits on the class, such services should be appropriately rewarded. If they are not, there will simply be no incentive for public interest law firms to undertake such difficult assignments.

Id. at 169. *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905, 1992 WL 210138 (S.D.N.Y. Aug.24, 1992), a pre-*Goldberger* case, is even less persuasive. There, the court awarded a multiplier of 6 by automatically adhering to the 25% figure that the market generally paid – a practice disavowed in *Goldberger. Id.* at *7.

Second, the magnitude and complexities of the litigation were enormous. The case involved almost every U.S. bank and more than five million U.S. merchants. As to complexity, Professor Harry First correctly describes the case as "a very complicated one, presenting, on virtually every legal point, unique issues with uncertain outcomes." (First Dec. ¶ 64.)[30]

Third, the litigation was very risky. Constantine & Partners devoted 52% of its attorney and paralegal resources to this case. (*See* Fee Pet. at 36.) Naturally, this investment of resources substantially impacted the firm's ability to staff other matters and to accept new profit-generating matters. Such a hardship weighs in favor of higher compensation, particularly where, as here, Lead Counsel did not benefit from any previous or simultaneous government litigation, *see, e.g., In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y.1992) ("[T]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill. They did all the work on their own.").[31]

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[30] Professor Harry First teaches at New York University Law School. He specializes in antitrust and trade regulation, an area in which he has published casebooks and numerous articles. He also served from 1999 to 2001 as Chief of the Antitrust Bureau of the New York State Attorney General's Office. (First Dec. ¶ 1.) He explained that the case was so difficult because, *inter alia:* (1) certain presumptions were unavailable; (2) the description and analysis of tying debit to credit products proved more challenging than in the typical case; and (3) the defendants' market power was particularly difficult to prove. (Fee Pet. at 32-33 (citing First Dec. ¶¶ 9-17, 20-33).)

[31] Indeed, the government piggybacked on Class Counsel's efforts. Two years after this action was filed, the Federal Trade Commission began investigating the practices of defendants at issue here, using the

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Fourth, the excellence of the representation of plaintiffs, especially in light of the very high quality of opposing counsel, cannot seriously be debated. Constantine & Partners is a premiere plaintiffs' litigation firm, specializing in antitrust litigation particularly and complex commercial litigation generally. Its work is uniformly excellent, and thus it is no surprise that it has led the effort that produced the largest antitrust settlement ever. *See Goldberger,* 209 F.3d at 55 ("[T]he quality of representation is best measured by results.")

The fifth factor is the relationship of the fee to the Settlements. Here, the Settlements are so large, particularly considering the injunctive relief, that even the exorbitant fee I award seems small in comparison.

Last, public policy considerations support a substantial fee award. Although Lead Counsel's descriptions of their accomplishments have not been free of hyperbole, I agree that the Settlements have produced significant and lasting benefits for America's merchants and consumers. The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future. *See id.* at 51 ("There is . . . commendable sentiment in favor of providing lawyers with sufficient

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briefings and documentation of Lead Counsel. (Constantine Dec. ¶¶ 26-30.) Based in part on this information, the Department of Justice filed its lawsuit against Visa and MasterCard based on their exclusionary practices. *See United States v. Visa U.S.A., Inc.,* 163 F.Supp.2d 322 (S.D.N.Y.2001), *modified by* 183 F.Supp.2d 613 (S.D.N.Y.2001), *aff'd,* 344 F.3d 229 (2d Cir.2003). As noted earlier, in January 2000, I granted the government's motion to intervene in this action to allow Lead Counsel to share with the government their substantial analysis of the documents and depositions in this action. *In re Visa Check/MasterMoney Antitrust Litig.,* 190 F.R.D. 309, 312 (E.D.N.Y.2000).

incentive to bring common fund cases that serve the public interest.").

Considering all of these factors, and in light of all of the circumstances of this case, I award attorneys' fees in the amount of $220,290,160.44. This amount represents approximately 6.511% of the Fund. The lodestar cross-check, which results in a multiplier of 3.5, further convinces me that my award is reasonable. *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir.2001) (in surveying cases with megafunds over $100 million, found lodestar multiplier of 1.35 to 2.99 common); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y.1998) ("multipliers of between 3 and 4.5 have become common" (quotation marks omitted)).

Lead Counsel have warned that an award of such a small percentage, based on the declining percentage approach, would operate to "punish[] attorneys who recover large settlements as a direct result of their outstanding efforts." (Fee Pet. at 58.) Their experts have advised that an inverse relationship may properly exist between the percentage of recovery and the lodestar multiplier, at least where the percentage falls below the norm.[32] Here, Lead

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[32] *See* Coffee Dec. ¶ 45 ("[T]he more the percentage of the recovery falls below the norm, the more the multiplier may rise above the average. One balances the other.") (quotation marks omitted); Miller Dec. ¶ 21 n. 4 ("The use of a lodestar/multiplier methodology in megafund cases becomes a less reliable cross-check. This is because the multiplier is generally above the norm in these cases even though the percentage of recovery may be lower than the norm. To rely too heavily on the lodestar/multiplier methodology in such cases would thus eviscerate the percentage of recovery method, which I think is the appropriate metric."). Professor Arthur R. Miller teaches at Harvard Law School. He has authored many books and treatises, including *Federal Practice and Procedure*, as well as law reviews and articles on

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Counsel have asserted that their request of 18% is well below the norm for megafund cases (*id.* at 54-57), and thus it is to be expected that their multiplier will be as high as 9.68. I am mindful of both contentions. Were the case not so fully litigated, settling only on the eve of opening statements, a larger multiplier might well be necessary to properly reward Class Counsel and encourage counsel to bring similar cases in the future. Were the Fund not so large, dwarfing the funds in all of the cases Lead Counsel have cited,[33] a larger percentage might be appropriate. But given the circumstances as they are, my award is appropriate.

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the subject of class actions and attorneys' fees. He also served as reporter for the Third Circuit's Task Force on Court Awarded Attorneys' Fees. (Miller Dec. ¶¶ 1-3.)

[33] Most of the megafund cases cited by Lead Counsel do not involve funds even approaching the $1 billion mark, let alone the more than $3 billion mark of this action. Similarly, most of the cases cited by Lead Counsel do not involve multipliers at or near that in this action. Certainly, none of these cases possess both qualities. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir.), *cert denied*, 537 U.S. 1018, 123 S.Ct. 536, 154 L.Ed.2d 425 (2002) (awarding 28% of an approximate $97 million dollar fund, which produced a 3.65 multiplier); *In re Buspirone Antitrust Litig.*, No. 01-MD-1410, at 4, 42-45 (S.D.N.Y. Apr. 11, 2003) (awarding 33.3% of a $220 million dollar fund, which produced a multiplier of 8.46); *In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, at 18-20 (E.D.Mich. Nov. 26, 2002) (awarding 30% of a $110 million dollar fund, which produced a multiplier of 3.7); *In re Methionine Antitrust Litig.*, No. C 99-3491, MDL No. 00-1311, at 1, 8-9 (N.D.Cal. Oct. 3, 2002) (awarding approximately 22.6% of a $107 billion dollar fund with a multiplier of approximately 1.85); *In re Vitamins Antitrust Litig.*, No. 99-197, MDL 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding about 34% of about a $360 million dollar fund); *Kurzweil v. Philip Morris Cos.*, Nos. 94 Civ. 2373, 94 Civ. 2546, 1999 WL 1076105, at *1-2 (S.D.N.Y. Nov.30, 1999) (awarding 30% of about a $124 million dollar fund, which produced a multiplier of 2.46); *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 399-400 (S.D.N.Y.1999) (awarding 27.5% of a $116.6 million dollar fund, which produced a multiplier of 2.5).

Only in comparison to the amount sought can it be considered anything but generous. If it amounts to punishment, I am confident there will be many attempts to self-inflict similar punishment in future cases.

Lead Counsel also claim that their requested fee is justified if one considers the massive economic benefits of the injunctive relief. (*Id.* at 49-52.) They assert that their requested fee is "reasonable, and indeed conservative" because it is only 2.14% of the total settlement ($3,383,400,000 in compensatory relief plus $25,076,000,000 in injunctive relief). (*Id.* at 52.) I agree that the substantial injunctive relief here should inform my decision on awarding fees, and it has.

Last, I award Lead Counsel reimbursement from the Fund for $18,716,511.44 in costs and expenses. The lion's share of these expenses reflects the costs of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses. (*Id.* at 69.) I see no reason to depart from the common practice in this circuit of granting expense requests. *See In re Arakis Energy Corp. Sec. Litig.*, No. 95 CV 3431, 2001 WL 1590512, at *17 n. 12 (E.D.N.Y. Oct.31, 2001).[34]

[34] There was one objection to reimbursement of expenses. The objector asserts that I should award attorneys' fees calculated on the net recovery to the Class, excluding costs and expenses. (*See* Buholzer Obj. at 17-19.) I disagree. *See Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir.2000) (explaining that it makes no difference whether attorneys' fees are based on the net or gross recovery, so long as the fee is reasonable).

CONCLUSION

For the reasons stated above, I approve the Settlement Agreements and the plan of allocation. I order the award of $220,290,160.44 in attorneys' fees to Class Counsel (to be distributed by Lead Counsel), as well as reimbursement for costs of $18,716,511.44.

So Ordered.

App. 98

BEST AVAILABLE COPY

Original Design
St. Luke Parish FCU
New Design
Debit

2003 WL 1712568 (E.D.N.Y.)

United States District Court,
E.D. New York.

In re VISA CHECK/MASTERMONEY ANTITRUST LITIGATION

No. 96-CV-5238 (JG).

April 1, 2003.

MEMORANDUM AND ORDER

GLEESON, J.

In this class action brought by various retailers ("the merchants") against Visa and MasterCard ("the defendants"), the merchants claim that the defendants are violating the antitrust laws by forcing them to accept the defendants' debit cards and by attempting (and conspiring) to monopolize the debit card services market. In *In re Visa Check/MasterMoney Antitrust Litigation,* 192 F.R.D. 68 (E.D.N.Y.2000), *aff'd,* 280 F.3d 124 (2d Cir.2001), *cert. denied,* 122 S.Ct. 2382 (2002), familiarity with which is assumed, I certified a class of roughly four million merchants.

The parties have moved for summary judgment, and MasterCard has moved for a severance. For the reasons stated briefly below, I grant the merchants' motion for summary judgment in part and deny it in part, and I deny both of the defendants' motions for summary judgment in their entirety. MasterCard's motion for a severance is denied as well.

DISCUSSION

A. *The Standard for Summary Judgment*

The Second Circuit has counseled district courts that "summary judgment serves a vital function in the area of antitrust law" "[b]y avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir.1998) (citations omitted). Yet plaintiffs are not required to overcome any "special burden" when "opposing summary judgment in an antitrust case" and "can defeat the motion by coming forward with specific facts to show a genuine issue exists requiring a trial." *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 262 (2d Cir.2001) (internal quotations and citations omitted). "Summary judgment is appropriate only where, examining the evidence in the light most favorable to the nonmoving party, the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir.2002) (*per curiam*) (internal quotations and citations omitted). The moving party may discharge its burden by showing that there is an absence of evidence to support the non-moving party's case. *Id.* at 105. Faced with such evidence, the nonmoving party must then come forward with sufficient evidence to show that there is a genuine issue of material fact requiring trial. *Id.*

B. *The Merchants' Antitrust Claims*

The merchants bring a total of seven claims against the defendants under the Sherman Act. 15 U.S.C. §§ 1 & 2. They first claim that, in violation of § 1 of the Sherman

Act, Visa and MasterCard each use their respective power in the credit card services market to force the merchants to accept their debit cards. They also claim that the defendants act in concert to violate § 1 of the Sherman Act in this way. The merchants further claim that, in violation of § 2 of the Sherman Act, Visa independently and together with MasterCard is attempting to monopolize, and conspiring to monopolize, the debit card services market.

1. *The Section One Claims*

The merchants claim that Visa and MasterCard, acting independently and jointly in a conspiracy, employ illegal tying arrangements that leverage their power in the credit card services market to force the merchants to accept their debit cards. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product.'" *Yentsch v. Texaco, Inc.,* 630 F.2d 46, 56 (2d Cir.1980) (quoting *N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 5 (1958)). The merchants can establish the defendants' liability for such an arrangement by showing that it is illegal under either a per se or rule of reason analysis.

To show that such an arrangement is illegal under the per se test, the merchants must establish four elements: "(1) that the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable market power in the tying market." *In re Visa Check,* 280 F.3d at 133 n. 5 (citing *United States v. IBM Corp.,* 163 F.3d 737, 741 (2d Cir.1998)). The merchants can also show that a tying arrangement is illegal under the rule of reason test by

proving that "the challenged action had an adverse effect on competition as a whole in the relevant market and, if the defendant shows a pro-competitive redeeming virtue of the action, that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition." *In re Visa Check,* 280 F.3d at 133 n. 5 (citing *Clorox Co. v. Sterling Winthorp, Inc.,* 117 F.3d 50, 56 (2d. Cir.1997)).

There is no real dispute with respect to the first and third elements of the per se test. In 1999 alone, merchants processed over one hundred and fifty billion dollars in sales through the defendants' off-line debit cards. This figure is "not insubstantial." *Fortner Enters., Inc. v. United States Steel Corp.,* 394 U.S. 495, 501 (1969). To the extent that the defendants contend that this element incorporates the need for a showing of "foreclosure" or "anticompetitive effect" in the tied product market, I disagree. As for the tie, Visa and MasterCard's Honor All Cards rules require merchants who accept Visa and MasterCard credit cards to also accept their off-line debit cards. Defendants do not claim otherwise. Thus, defendants indisputably tie the sale of their debit card services to the sale of their credit card services.

I conclude that the second element of the per se test is satisfied as well. Whether two products are distinct for the purposes of a tying claim "turns not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 19 (1984); *see also Eastern Kodak Co. v. Image Tech. Serv. Inc.,* 504 U.S. 451, 462-63 (1992). Overwhelming evidence establishes that merchant demand for credit card services is distinct from merchant demand for debit card services: those services are sold

separately; many merchants would refuse to use off-line debit services if given the choice to do so; and the defendants themselves have repeatedly acknowledged in their business strategy and marketing activities the distinctive attributes of their off-line debit services compared to their credit card services.

Although they assert that factual questions exist on this issue, the defendants' main argument addresses the legal standard. Specifically, they assert that two products are not distinct unless the demand for them is such that it is efficient for a firm to provide them separately. Since plaintiffs cannot show that it would have been efficient for Visa and MasterCard to create a separate brand and a separate acceptance network for their off-line debit cards, defendants argue, summary judgment on this issue ought to be in their favor, not the merchants'. I disagree. The proper question is not whether it was more efficient for the defendants to offer debit card services and credit card services together, but whether the nature of the demand is such that those services could be offered separately. In this case, applying that principle, no rational juror could fail to conclude that the products are distinct. *See United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322, 335-38 (S.D.N.Y.2002) (rejecting after trial defendants' claim that general purpose credit card market includes all methods of payment, including debit cards, and noting defendants' own statements and studies confirming distinctions between debit and credit card services). I therefore grant the merchants' motion for summary judgment on the first three elements of their per se tying claim.

As for the fourth element, I conclude that Visa possesses appreciable economic power in the tying product market. There is no genuine issue of material fact requiring

trial with respect to the fact that the relevant market, at its broadest, is the provision of general purpose credit and charge card services. The evidence establishes conclusively that merchants have not switched to other payment devices despite significant increases in the interchange fees on the defendants' credit cards. (In this respect, the evidence suggests an even narrower product market, *i.e.* general purpose credit card services alone.) That *consumers* might switch to another form of payment in the event of a surcharge on their credit card transactions does not alter the fact that there is no cross-elasticity of demand at the merchant level between defendants' products and all other forms of payment. *See United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 400 (1956). Indeed, in a separate case, Visa itself adopted this market definition, excluding all forms of payment except credit and charge cards. *See SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 36 F.3d 958, 966 (10th Cir.1994). Visa claims that its prior statements embracing this market definition have no evidentiary value in this case. I disagree.

In that relevant market, the merchants argue that I should consider the two defendants collectively for purposes of determining whether they "have either the degree or the kind of market power that enables [them] to force customers to purchase a second, unwanted product in order to obtain the tying product." *Jefferson Parish*, 466 U.S. at 17-18. Their argument presumes the existence of concerted activity by the defendants with regard to their debit card strategies. Although there is evidence of such concerted activity, there is also evidence that the defendants competed with one another as well. I cannot conclude as a matter of law that a conspiracy – or any other

form of concerted activity that would justify treating the defendants as a single entity – existed.

Viewing the defendants individually, Visa indisputably possesses sufficient market power "to force [merchants] to do something that [they] would not do in a competitive market." *Id.* at 13-14; *see also id.* at 26-29. Visa's share of the general purpose credit and charge card market has fluctuated from ~~between 43 to 47~~ percent from 1991 to 1998, and its share of the credit card market alone is nearly 60 percent. *See* PX 679. This easily qualifies as "appreciable economic power" for purposes of the per se rule. *Eastman Kodak,* 504 U.S. at 464.

MasterCard's share of the credit and charge card services market, however, has fluctuated from between 26 to 28 percent over the same period, and its share of the credit card market alone has varied from between 33 to 36 percent. *See* PX 679. At this stage in the proceedings, I cannot conclude as a matter of law that MasterCard has "sufficient economic power" to warrant application of the per se rule. *N. Pac. Ry.,* 356 U.S. at 5-7; *see Jefferson Parish,* 466 U.S. at 17-18, 28-29. I therefore grant the merchants' motion for summary judgment on this element as it pertains to Visa, but deny it as it pertains to MasterCard.

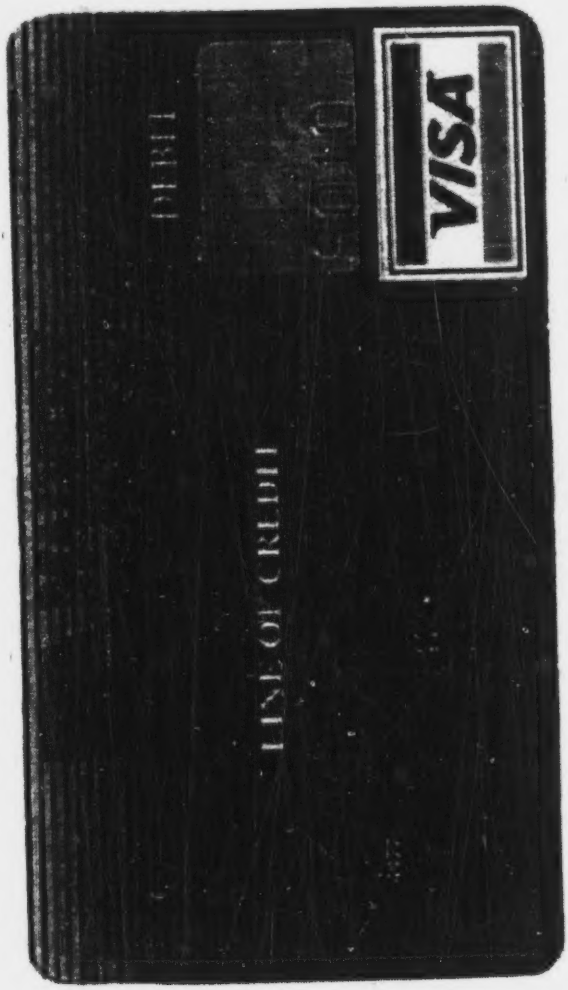
While the merchants succeed on the foregoing elements of their per se claim against Visa, the parties disagree over whether the per se rule is appropriate in this case. Per se analysis has generally fallen into disfavor in modern antitrust law, *see, e.g., Bus. Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977), although the Supreme Court has counseled that "[i]t is far too late in

the history of our antitrust jurisprudence to question the proposition that *certain* tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" *Jefferson Parish,* 466 U.S. at 9 (emphasis added). Not all tying arrangements are subject to per se analysis. *Id.* at 11 ("It is clear . . . that every refusal to sell two products separately cannot be said to restrain competition."). Instead, for tying claims,

> per se condemnation – condemnation without inquiry into actual market conditions – is only appropriate if the existence of forcing is probable. Thus, application of the per se rule focuses on the probability of anticompetitive consequences. . . . [A]s a threshold matter, there must be a substantial potential for impact on competition in order to justify per se condemnation. . . . Once this threshold is surmounted, per se prohibition is appropriate if anticompetitive forcing is likely.

Id. at 15-16.

The plaintiffs have largely assumed away this threshold determination in favor of a strict application of the four elements of the per se rule address above. The defendants contend that per se analysis is inappropriate here because the merchants have failed to demonstrate that the Honor All Cards rules have "foreclosed competition on the merits" in the debit card services market. *Id.* at 21. Since the merchants are not precluded from accepting competing online debit cards, the defendants argue, the merchants have failed to show that the arrangement poses any threat to competition in the tied product market. In support of this argument, the defendants point to decisions of the Second Circuit that appear to engraft an "anticompetitive effect" element onto the test for illegal tying arrangements, *see,*


VISA
LINE OF CREDIT

St. Luke Parish FCU
Debit
MasterCard

e.g., Hack v. Yale College, 237 F.3d 81, 86 (2d Cir.2000), and to the decisions of other courts of appeals that have rejected per se analysis of so-called "full-line forcing" arrangements, where suppliers require distributors to carry their full line of products without preventing those distributors from accepting competing ones. *See, e.g., Smith Mach. Co., Inc. v. Hesston Corp.,* 878 F.2d 1290, 1294-98 (10th Cir.1989).

I am not persuaded that *Jefferson Parish*'s threshold for per se analysis looks exclusively toward the issue of actual foreclosure or anticompetitive effect in the tied product market. It is true that *Jefferson Parish* makes clear that, in deciding the appropriateness of per se analysis, the inquiry "must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact." 466 U.S. at 18. But the Court, citing extensively to precedent, noted two situations where, based on a defendant's power in the tying product market alone, anticompetitive forcing would be *probable* in the tied product market and thus per se analysis was justified. *Id.* at 16-18.[1] Given this background, per se

[1] First, the Court noted that whenever a seller with monopoly power in the tying product market (by virtue of a patent) attempted to expand that power into another market, anticompetitive effect in the tied product market could be presumed. *Id.* at 16 (citing *United States v. Loew's, Inc.,* 371 U.S. 38 (1962); *United States v. Paramount Pictures,* 334 U.S. 131 (1948); *Int'l Salt Co. v. United States,* 332 U.S. 392, 395-96 (1947); *IBM v. United States,* 298 U.S. 131 (1936)). Second, the Court noted that if a seller's "share of the market [in the tying product] is high" or if it "offers a unique product that competitors are not able to offer," a court could also conclude that "the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate." *Jefferson Parish,* 466 U.S. at 18 (citing *Fortner,* 394 U.S. at 495; *N. Pac. Ry.,* 356 U.S. at 1; *Times-Picayune Publ'g Co. v. United States,* 345 U.S.

(Continued on following page)

analysis may be appropriate when a defendant with sufficient economic power in one product market uses that power to force downstream consumers to accept another product on the defendant's own economic terms and where this arrangement has a significant probability of anticompetitive effect on competition in the tied product market. The "line-forcing" cases cited by the defendants are inapposite here; they involve "typical line forcing situation[s]" between one distributor and one upstream supplier, in which the supplier lacked significant economic power in a distinct tying product market and the tying agreement lacked any price-control component. *Smith Mach.*, 878 F.2d at 1297; *see id.* at 1296-98 (noting that the supplier's competitor, not the supplier, possessed significant economic power in both the tying and tied product markets and thus "the likelihood that [the supplier's tying] policy causes *anticompetitive* forcing is virtually nil") (emphasis in original). Neither of those conditions is present here.

However, there are factors that counsel against invoking the per se rule at this stage in the case. First, there is a factual issue with regard to MasterCard's market power. Depending on the outcome of that issue, the merchants' tying claim against MasterCard may require them to prevail under the rule of reason test. *See Jefferson Parish,* 466 U.S. at 17 ("When, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second,

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594 (1953)). On this latter point, the Court explained in *Northern Pacific Railway* that tying agreements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." 356 U.S. at 6; *see also Eastman Kodak,* 504 U.S. at 464-80; *Fortner,* 394 U.S. at 512-13 (White, J., dissenting).

unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market."). Thus, the actual market effects of MasterCard's Honor All Cards rule, and its pro-competitive justifications, will be tried in any event. Second, it is not clear to me whether the Second Circuit's per se standard in fact requires proof of a fifth element, *i.e.*, foreclosure of competition or anticompetitive effect in the tied product market. *Compare In re Visa Check,* 280 F.3d at 133 n. 5 (stating only four elements for per se tying claim), *and IBM,* 163 F.3d at 741 (noting only four elements for unlawful tying arrangement), *with Hack,* 237 F.3d at 86 (stating five elements, including "anticompetitive effects in the tied market," for tying claim), *DeJesus v. Sears, Roebuck & Co. Inc.*, 87 F.3d 65, 70 (2d Cir.1996) (same). Finally, there are several unique features of this case – the relationship between the merchants and the defendants, the relationship between the defendants themselves (and among their member banks), the nature of the tying arrangements, and the ultimate effects of these arrangements on consumers – that will benefit from further development at trial. *See, e.g., United States v. Microsoft Corp.,* 253 F.3d 34, 90-95 (D.C.Cir.2001).

In addition to their claims of substantive tying violations of § 1, the merchants claim that Visa and MasterCard acted in concert to impose those illegal tying arrangements on them. The defendants contend that the merchants have failed to present any "direct or circumstantial evidence that reasonably tends to prove that [they] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764 (1984) (quotations

and citations omitted). I disagree. There is evidence, direct and circumstantial, from which a jury could find a conspiracy. *See Apex Oil Co. v. DiMauro,* 822 F.2d 246, 252-60 (2d Cir.1987).

For these reasons, the merchants' motion for summary judgment on their per se claims is denied. A trial will be held on, among other issues, those that lie at the heart of the merchants' § 1 claims: whether Visa and MasterCard's Honor All Cards rules harmed competition in the debit card services market, and whether the defendants acted together to produce that result.

2. *The Section 2 Claims*

The merchants contend that Visa, separately and together with MasterCard, is attempting to monopolize and conspiring to monopolize the debit card services market, in violation of § 2 of the Sherman Act. That section provides in relevant part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations" has violated the law. 15 U.S.C. § 2. To prevail on an attempt to monopolize claim, the merchants must show: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456 (1993). To win on a conspiracy to monopolize claim, a plaintiff must show: "(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the

conspiracy." *Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 795 (2d Cir.1987).

a. *Standing*

The defendants contend that the merchants lack standing to bring their § 2 claims. I disagree. The merchants are direct consumers of the defendants' debit cards services and are directly injured by their allegedly anti-competitive conduct. Accordingly, the merchants have standing for purposes of the antitrust laws. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 536-45 (1983); *Crimpers Promotions Inc. v. Home Box Office, Inc.,* 724 F.2d 290, 293-97 (2d Cir.1983).

b. *The Attempt to Monopolize Claim Against MasterCard*

MasterCard contends that the attempt to monopolize claim against it should be dismissed because it alleges an illegal "conspiracy to attempt to monopolize," which is not recognized by the antitrust laws. *See, e.g., Windy City Circulating Co. v. Charles Levy Circulating Co.,* 550 F.Supp. 960, 967 (N.D.Ill.1982). I find that the evidence of common ownership, a lack of competition, and incidents of concerted activity by the two defendants could permit a jury to conclude that MasterCard, along with Visa, is attempting to monopolize the relevant market.

c. *The Relevant Market*

There is no genuine issue of material fact regarding the relevant product market – the debit card services

market. Contrary to the defendants' contention that the relevant market is all forms of payment, debit card services is a well-defined submarket characterized by an inelasticity of demand and universal recognition by the public, the parties, and the industry as a whole. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 324-26 (1962). No rational jury could conclude otherwise.

d. *Predatory or Anticompetitive Conduct*

The Second Circuit has yet to articulate a precise test for the "predatory or anticompetitive conduct" element of an attempt to monopolize claim. The Supreme Court has cautioned, however, that § 2 of the Sherman Act is not to be applied "against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself" and that "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects." *Spectrum Sports,* 506 U.S. at 892. While the courts of appeals have struggled to articulate the difference between permissible and impermissible conduct under § 2, *compare Microsoft,* 253 F.3d at 58-59 (establishing alternating, four-part test for anticompetitive conduct under § 2), *with Gen. Indus. Corp. v. Hartz Mtn. Corp.,* 810 F.2d 795, 804 (8th Cir.1987) (stating simply that "[a]nticompetitive conduct is conduct without legitimate purpose that only makes sense because it eliminates competition"), many circuits have held that illegal conduct like an impermissible tying arrangement under § 1 "may also qualify as anticompetitive conduct for section 2 purposes." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.,* 63 F.3d 1540, 1550 (10th Cir.1995) (citing cases and treatise). Given the nature of their tying claims and the

merchants' factually-supported allegations of predatory and anticompetitive conduct by both Visa and MasterCard, I conclude that the merchants have presented sufficient evidence on this element to proceed to trial.

e. *Specific Intent to Monopolize*

A defendant's specific intent to monopolize can be found from its own words or inferred from its predatory and anticompetitive conduct. *See Tops Mkts.*, 142 F.3d at 101-102. Viewed in the light most favorable to the merchants, the defendants' statements and conduct relating to online debit cards render their alleged specific intent to monopolize the debit card services market an issue of fact for a jury to resolve.

f. *Dangerous Probability of Achieving Monopoly Power*

In assessing the probability of achieving monopoly power in the relevant product market, courts are guided by characteristics such as the defendant's market share, any barriers to entry by competitors, the nature of competition in that market, and the overall development of the industry. *See Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 408-409 (2d Cir.1988); *see also Tops Mkts.*, 142 F.3d at 100-101. The merchants have come forward with sufficient evidence to create a genuine issue of material fact regarding this element. *See Microsoft*, 253 F.3d at 80 (noting that the "determination whether a dangerous probability of success exists is a particularly fact-intensive inquiry"). Visa's individual market share satisfies any "threshold showing," *AD/SAT v. Associated Press*, 181 F.3d 216, 226 (2d

Cir.1999) (quotation and citation omitted), and if Visa and MasterCard are proved to have acted in concert, this element could be satisfied as a matter of law. *See Kelco,* 845 F.2d at 409 (finding dangerous probability where defendant had 55% market share).

g. *Conspiracy to Monopolize*

The defendants assert that the merchants have failed to present any direct or circumstantial evidence of a conspiracy. *Monsanto Co.,* 465 U.S. at 764. As I mentioned above, I disagree.

3. *The Merchants' Damages Theory*

The Supreme Court has repeatedly observed that damages in antitrust cases are "rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969); *see also J. Pruett Payne Co., Inc. v. Chrysler Motors Corp.,* 451 U.S. 557, 561-68 (1981) ("in order to recover damages [plaintiffs] must establish . . . some approximation of damages;" the "traditional rule excus[es] antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury"). The defendants contend that the merchants' expert testimony fails to present a viable theory of damages. Many of the defendants' arguments on this subject have already been rejected at the class certification stage. *See In re Visa Check,* 280 F.3d at 138-40; *In re Visa Check,* 192 F.R.D at 81-87. In any event, I conclude that the merchants have presented a sufficiently compelling (and factually-supported) theory of damages to warrant a trial of the issue.

4. *The Failure-to-Mitigate Defense*

"An antitrust plaintiff has a duty to mitigate damages." *Litton Sys., Inc. v. AT & T,* 700 F.2d 785, 820 n. 47 (2d Cir.1980). Visa and MasterCard have both raised the merchants' "failure to mitigate" as an affirmative defense. The merchants contend that I should dismiss the defense as a matter of law as unreasonable, impracticable, and impermissible under the defendants' own rules. I find the argument to be without merit. There is ample evidence on both sides of the question whether the merchants could have mitigated their damages (by, for example, "steering" their customers to online debit transactions). The existence of that genuine issue of material fact precludes summary judgment on the defense.

C. *MasterCard's Motion to Sever*

MasterCard, with the support of Visa, seeks a separate trial of the claims against it. The motion is premised on an assertion that the jury in a trial including both defendants would be confused and unable to weigh the evidence separately as against each defendant. I see no reason why that would occur, or why a properly-instructed jury could not give both defendants a fair trial. Accordingly, there is no basis for a severance. The alternative request for a pretrial hearing to determine the admissibility of statements offered pursuant to Fed.R.Evid. 801(d)(2)(E), *see United States v. James,* 590 F.2d 575 (5th Cir.1979), is denied as well. The admissibility of any such evidence will be determined at trial.

CONCLUSION

The merchants' motion for summary judgment is granted in part and denied in part. The defendants' motions for summary judgment are denied in their entirety. MasterCard's motion for a severance is denied.

So Ordered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: VISA CHECK/MASTERMONEY ANTITRUST LITIGATION,	:	CV 96-5238
	:	U.S. Courthouse Brooklyn, N.Y.
	:	Settlement Fairness Hearing
	:	September 25, 2003 9:30 a.m.

BEFORE:

HONORABLE JOHN GLEESON
United States District Judge

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* * *

THE CLERK: All rise.

THE COURT: Good morning everybody.

MR. CONSTANTINE: Good morning, Your Honor.

THE COURT: Please be seated.

THE CLERK: Do you want all of the parties to state their names?

THE COURT: No.

COURT REPORTER: Thank you, Your Honor.

THE COURT: Okay.

This is, obviously, the settlement hearing with respect to the proposed settlement of the Visa Mastercard anti-trust case.

I am going to proceed this morning substantially in the way proposed in the letter from Mr. Begleiter, dated September 16th, with some modifications.

I will allow lead counsel for the Class to give a short description of the settlements, the allocation plan, and the

petition for award of fees and reimbursement of costs. I will allow 30 minutes for that.

Then I will hear from the objectors who want to be heard from. Let me emphasize at the outset that I have read these objections. It is not useful simply to repeat them. I am going to give you an opportunity to be heard, but don't feel constrained to get up and repeat what is in your papers as though nobody has read them. I have. So you don't need [9] to speak if you don't want to.

I want to hear first, assuming that he still wishes to be heard orally, from Mr. Schonbrun. Who will be limited to fifteen minutes. I recognize some people and not all. Some have made specific applications for amounts of time. To the extent that you have, and I am granting less than what you have asked for. Obviously, to that extent, overruling your request.

I want to hear last from Mr. Grossman. Let me first ask, Mr. Schonbrun, are you present?

MR. SCHONBRUN: Yes, I am Your Honor.

THE COURT: Do you still want to be heard.

MR. SCHONBRUN: I would, Your Honor.

THE COURT: All right.

I want to hear last before I hear once again from the plaintiff's counsel, from the lawyers who will argue the two release issues. They are, if I have my notes correct, Mr. Grossman on behalf of Nu-City Publications, Inc.

Are you present?

MR. GROSSMAN: Yes, I am Your Honor. I would like to be heard.

THE COURT: All right.

You don't have to take all of the twenty minutes that I will allow you. But I will allow you up to twenty minutes.

[10] The second of those is Mr. Flamm. Are you present, sir?

MR. FLAMM: Yes, Your Honor.

THE COURT: Do you want to be heard orally?

MR. FLAMM: I have a pending motion for pro hac vice admission for Mr. Archer.

THE COURT: Granted.

Do you want to be heard orally?

MR. ARCHER: Yes, Your Honor.

THE COURT: All right. You two can speak up to twenty minutes. Again, I want to hear from you at the end of the line of objectors who will speak orally.

Mr. Helfand. Steven Helfand.

MR. HELFAND: Yes, Your Honor.

THE COURT: Are you present?

MR. HELFAND: Yes.

I would like to be heard. My co-counsel, Mr. Davis, will be making a brief presentation.

THE COURT: All right.

MR. DAVIS: Good morning, Your Honor.

THE COURT: I am glad to hear it will be brief. It will be no longer than five minutes.

MR. DAVIS: Yes, Your Honor.

THE COURT: John Pentz.

MR. PENTZ: Present, Your Honor.

[11] I would like to be heard.

THE COURT: On behalf of Round House, is that correct, doing business as Smuggler's Cove?

MR. PENTZ: Yes, Your Honor.

That is correct, Your Honor.

THE COURT: I am limiting your argument to ten minutes, Mr. Pentz.

MR. PENTZ: Yes, Your Honor.

THE COURT: Beaches N Cream is represented by Nicholas Fasto. Who is not present, I take it? I will take his objection in writing only.

Leonardo's Pizza By the Slice is represented by John Duane.

MR. DUANE: Yes, Your Honor. Good morning, Your Honor.

We would like to be heard. I have a pro hac vice motion pending.

THE COURT: I take it that you are a member of good standing of the bar of a state, at least one?

MR. DUANE: Your Honor, I an a member of this bar.

THE COURT: Okay.

MR. DUANE: I have my co-counsel here, who is a member in good standing of the bar of the State of Ohio.

THE COURT: Which one of you will argue?

MR. DUANE: Mr. Cochran will argue.

[12] THE COURT: All right.

MR. DUANE: If the motion is granted.

THE COURT: You are moving for his admission pro hac vice?

MR. DUANE: The motion is pending, Your Honor.

THE COURT: All right. It is granted.

MR. DUANE: Thank you, Your Honor.

THE COURT: He may argue for up to five minutes.

I am sorry. Say his name again.

MR. DUANE: Ed Cochran.

THE COURT: Cochran?

MR. DUANE: Yes, Your Honor.

THE COURT: C-O-C-H-R-A-N?

MR. DUANE: Yes, Your Honor.

THE COURT: Thank you.

J. Scott Kessinger, are you present?

MR. PENTZ: Your Honor, he is not. I will be speaking on behalf of his objection also in my time.

COURT REPORTER: Your name again, sir?

MR. PENTZ: John Pentz.

THE COURT: Spell your last name.

MR. PENTZ: P-E-N-T-Z.

THE COURT: Okay.

You represent Kicker's Corner of Americas?

MR. PENTZ: I don't.

[13] Scott Kessinger does, who I am appearing for today.

THE COURT: Who do you represent?

MR. PENTZ: I represent Smuggler's Cove.

THE COURT: Well, they are already being heard.

MR. PENTZ: Okay, fine.

THE COURT: I will take Kicker's Corner of Americas objection on submission.

R. Stephen Griffis on behalf of Sound Deals and Digital Playroom.

MR. GRIFFIS: Yes.

THE COURT: You sought thirty minutes.

MR. GRIFFIS: No more than that, Your Honor.

THE COURT: All right, good. I will limit you to ten minutes.

THE COURT: Charles Thompson indicated in his objection no intent to appear. I take it Mr. Thompson is not present.

MR. GRIFFIS: Charles Thompson and I submitted a consolidated brief on behalf of our clients and his clients.

THE COURT: Okay.

So you will be heard on behalf of everyone.

MR. GRIFFIS: Yes.

THE COURT: After Mr. Schonbrun I would like to hear, if he wishes to speak orally, from John Rasmussen. Is he present?

[14] MR. RASMUSSEN: Yes, Your Honor.

I will be very brief.

THE COURT: I will limit you to ten minutes, sir.

THE COURT: William Kenneth C. Dippel.

MR. DIPPEL: Yes, Your Honor.

THE COURT: Do you wish to be heard orally, sir?

MR. DIPPEL: Yes, sir.

THE COURT: You are limited to ten minutes as well. Young Pioneers and others have withdrawn their objection. Is that correct?

MR. CONSTANTINE: That is correct, Your Honor.

THE COURT: Kearney Dee Hutsler?

MR. GRIFFIS: That was the other firm, Your Honor.

THE COURT: Right. Okay.

Thank you, Mr. Griffis.

THE COURT: There is a pro se objection, Morris Villia. He indicated no intent to appear. I assume Mr. Villia, forgive the mispronunciation, is not here. Everyone is silent. He must not be here.

THE COURT: Paula McMillan from Southern Lady Flowers or representing Southern Ladies Flowers.

Are you present? That is pro se objection which I will take on submission.

Douglas Cole? There is silence. He is not present. I will take Wagner Bakery's objection on [15] submission.

Are there any objectors who are present through counsel who wanted to be heard, or pro se who wanted to be heard orally whose names I haven't mentioned?

(No response.)

All right. Who will speak first on behalf of the plaintiffs?

MR. CONSTANTINE: I will, Your Honor.

Good morning, Your Honor. My name is Lloyd Constantine. For the record, I am accompanied today by my co-lead counsel, Bob Begleiter; and George Sampson of the

firm Hagens Berman. We are also joined today by Professor John Coffee, from Columbia University. Who is up front here. We have Professor Franklin Fisher, from the Massachusetts Institute of Technology, who has been our economist throughout these proceedings.

There are four motions before the Court, Your Honor. There is the motion for a final approval of the merchant's settlement with Visa, the motion for final approval of the merchant's settlement with Mastercard, a motion for approval of the plan of allocation, and our petition for costs, expenses, and attorney's fees.

I am going to try to address all of these issues either now or later. I will try to answer all of your questions and all of the objections raised by the objectors.

* * *

[58] attorneys' fees, it certainly is not present in this kind of case. Especially where the lead plaintiff could afford to pay for this thing by the hour.

Thank you, Your Honor.

THE COURT: Thank you, sir.

Mr. Cochran.

MR. COCHRAN: May it please the court, my name is Edward W. Cochran.

C-O-C-H-R-A-N.

I am here representing objectors, 710 Corp. and Leonardo's Pizza By The Slice, Inc.

Your Honor, our objections contain matters as to the fee. I will not speak on that at all fully. I will incorporate

the comments of other objectors so that they are not repeated.

More to the point, Your Honor, Mr. Constantine I believe mentioned or said something to the effect in his presentation that there were no real objections to the core injunctive relief in this case. I don't believe that is the case. My objection contains about three pages of objections to Paragraph 10 of the settlement agreement with Visa.

Your Honor, within the last two weeks, and by the way, Your Honor, I may represent the only substantive antitrust objection here and the court has suggested the limitation of five minutes. I would informally request an [59] additional five if the court will indulge me.

THE COURT: Go ahead. You got it.

MR. COCHRAN: Several weeks ago, within the last several weeks, Your Honor, the United States Second Circuit has confirmed in a ruling that the agreements of Visa and Mastercard to keep out the credit card services of Discover and American Express are violative of the Sherman Act.

Yet, Your Honor, on that subject in this case which is dealt with only in the Visa agreement in Paragraph 10, Visa is permitted to continue to have agreements restricting their member banks from dealing with these regional competitors except for the next two years.

Furthermore, Your Honor, they are permitted to continue in the meantime in the enforcement of the current agreements during that time with no disclosure to anyone as to the term of the current agreements.

For example, Your Honor, if they have a current agreement with a member bank that is more than two years, clearly the paragraph means absolutely nothing.

If the agreements are annual agreements, then the restriction limiting Visa's activity to two years means almost nothing. Furthermore, Your Honor, there is no such restriction on Mastercard, Why is it if as Mr. Constantine said, and I think I am quoting here, "One of the goals of this case is to encourage competition in the credit card and [60] debit card area."

Why would they negotiate a settlement that permits Visa and for that matter Mastercard to agree with their member banks to keep out the competition of the regional networks?

This particularly on appropriate objection Your Honor can consider in light of the fact that the Second Circuit's decision occurred after the signing of this settlement agreement, after the preliminary approval of the settlement by this Court.

Your Honor, my written objections go into more detail about why this is such a glaring gap in the settlement agreement. I would submit that any settlement of this case whose announced objective is to encourage real competition and real competition in this area, that also contains a provision that permits Visa and Mastercard to enter into agreements with their member banks that completely exclude these regional members is not an agreement that should be approved by this Court or the Second Circuit.

Thank you, Your Honor.

THE COURT: I like that move. You asked for five more minutes and you give it back at the end.

MR. COCHRAN: Well, Your Honor, I am known for that around the country.

THE COURT: Mr. Griffis.

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